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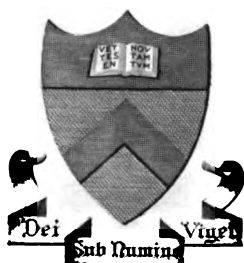
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Central Law Journal

ESTABLISHED 1874.

A National Law Weekly

Editor

ALEXANDER H. ROBBINS

Vol. 93.

St. Louis, Mo., July 8, 1921.

No. 1

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\$5.00 PER ANNUM

PUBLISHERS

25c PER NUMBER

CENTRAL LAW JOURNAL COMPANY

ST. LOUIS, MO.

Entered at the Post-office at St. Louis as Second Class Matter under the Act of March 3, 1879

SPECULATION AND GAMBLING IN OPTIONS, FUTURES AND STOCKS

By JAMES C. McMATH
Of Chicago, Illinois

That millions of dollars are lost annually in **speculation** in farm products and corporate stocks, and that millions more are lost in **gambling** on the fluctuations of the market prices thereof, are facts generally known.

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THE
Central Law Journal

ALEXANDER H. ROBBINS, Editor

VOLUME 93
JULY—DECEMBER, 1921

**CENTRAL LAW JOURNAL COMPANY,
ST. LOUIS, MO.
1921**

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Central Law Journal.

St. Louis, Mo., July 8, 1921.

POWER AND LIBERALITY OF THE COURT TO ALLOW AMENDMENTS.

In spite of the assurances given by lawyers at bar association meetings and elsewhere, and by enthusiastic text writers and publicists, that amendments to pleadings "are very liberally allowed in all formal and most substantial matters" (1 Bouv. Law Dict. 138), the courts in this country in actual cases are frequently as strict as they ever were at common law, and seem to be unable to get away from the idea that pleading is something sacred, upon the exact terms of which the parties must succeed or fail without correction or amendment except in purely formal matters. It is this attitude on the part of the American courts which has given cause for lay complaints against the administration of justice in this country, and is worthy of serious consideration by the bar.

A recent New York case will serve as a text for these observations. This case is not in itself particularly noteworthy, but is sufficiently so to illustrate a typical situation, existing everywhere, that must be corrected before the Bar can induce the public to believe that court-made rules of procedure will be more liberal or more liberally construed than those made by the Legislature. The case to which we refer is that of *Finch v. Fosler Co.* (App. Div. Sup. Ct., N. Y.), 65 N. Y. L. J. 883.

In this case plaintiff alleged that on or about the 19th day of May, 1920, he agreed with the defendant to purchase 1000 gross tons of steel rails at \$54 per ton, and thereafter sold said merchandise to A, and that defendant agreed to take over said order and pay plaintiff \$2 per ton for all merchandise shipped to and paid for by A. In making proof plaintiff was unable to show

a contract for 1000 rails made directly with himself, but on the contrary, showed that plaintiff had introduced A to defendant as his (plaintiff's) customer, and that defendant had agreed to pay plaintiff a commission of \$2 per ton on all orders for steel rails which A might order. Plaintiff, before verdict, asked the Court to allow an amendment to his pleading to conform to his proof. This, the Trial Court, in a proper exercise of its discretion in such cases, permitted. Defendant objected to the amendment but did not allege surprise or ask for a continuance, but seeks, on appeal, to have the judgment against him set aside on the ground that the Trial Court did not have the power to allow an amendment to the complaint which so substantially changed the cause of action. The Appellate Division of the Supreme Court, with medieval preciseness, agreed with defendant's contention, set aside the judgment, and compelled the plaintiff to sue again over a matter of which the defendant had ample notice and which could easily have been determined in the case after proper amendment had been made.

The general rule is that the allowance or refusal of amendments to pleading is "largely a matter which is in the sound discretion of the Trial Court." (31 Cyc. 368.) The great majority of cases hold that an appellate court will interfere only in gross abuses of such discretion. In some states, as well as in England, all such amendments are allowed as a matter of course. If they change the cause of action and defendant is surprised, the Court may continue the cause with imposition of costs, but in no case will the cause, having once come before the Court, be allowed to ride off to defeat simply because the plaintiff made a mistake in pleading his cause of action.

Let us note a few recent cases. Thus, it is held, that a cause of action for fraud can be amended to state a specific false representation shown by the evidence, but not

contained in the pleading. *Rathbun v. Parker*, 113 Mich. 594, 72 N. W. 31. So also an amendment conforming an allegation that a note was given by a firm, to evidence showing that it was given by an assignee of the firm, cannot be objected to on the ground of surprise. *Williston v. Camp*, 9 Mont. 88, 22 Pac. 501.

In this country it is admitted, we have not advanced far enough to permit an entirely new cause of action to be stated by way of amendment, although in England and Canada the test is not whether the amendment sets up a new cause of action, but whether the adverse party can be compensated for delay or inconvenience by an allowance for costs or otherwise. *Lee v. Gallagher*, 15 Manitoba 677. The best rule to our mind is stated in 31 Cyc. 410, when the author states:

"In some of the states it is within the power of the Court, before trial, to allow plaintiff to insert in his complaint, by way of amendment, a new and distinct cause of action, provided the result sought to be obtained is the same, and the amendment does not affect the substantial purpose of the action."

To this proposition may be cited, *inter alia*, the following cases: *Shropoline v. Kennedy*, 84 Ind. 111; *Deyo v. Morss*, 144 N. Y. 216, 39 N. E. 81; *Oliver v. Raymond*, 108 Fed. 927; *Chicago, etc., Ry. Co. v. Stein*, 75 Ill. 41; *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55.

In the *Oliver* case it was held proper to permit an amendment setting up an additional cause of action at law of the same nature and growing out of the same transaction, and the Court declared such amendments should be allowed in the interest of justice and to prevent a multiplicity of suits. In the *Gates* case it was held that any amendment is allowable where the action is not changed from one sounding in tort to one on contract, or from one at law

to one in equity, or *vice versa*. These courts represent the advanced lines of American progress in the matters of liberality of amending pleading and as opposed to the ridiculous rules of the fatality of a variance.

In the New York case the plaintiff alleged a contract by which he was to receive \$2.00 per ton on an order of 1,000 tons of steel rails. He alleged a direct contract for the rails, which contract was transferred, with the consent of the defendant, to one, A, at a profit of \$2.00 per ton. At the trial, however, plaintiff proved a contract by which he as a broker was to receive \$2.00 per ton as a commission on an order for 1,000 tons procured by him. The action in either case is one on contract, it arises out of the same transaction, concerns the same subject-matter, and is for the same amount of compensation. To say an amendment to change the allegation in such a case to conform to the proof constitutes a "substantial change in the cause of action" is to make the law ridiculous in the eyes of all thinking men. In this case an entirely different contract is not stated by the amendment, but merely a different form of the contract alleged to arise out of the same transaction.

We are not contending for looseness in pleading. We believe good pleading in the sense of a careful, concise statement of the cause of action is essential to give the Court jurisdiction and for the purposes of *res adjudicata*. But all these legitimate purposes are consistent with liberality in granting leave to amend a pleading either before trial is commenced or after trial to conform to the proof adduced. An amendment, of course, ought not to justify an absolute change of the cause of action, but such a change ought not to be regarded as effected by stating a contract differently from that alleged where the contract as stated in the amendment arises out of the same transaction set up in the original pleading.

NOTES OF IMPORTANT DECISIONS

WHEN DEATH INTENTIONALLY CAUSED BY ANOTHER IS ACCIDENTAL.—When a man who enters a quarrel is killed by his adversary, is his death accidental? The U. S. Circuit Court of Appeals (Sixth Cir.) declares it is if the deceased had no reason to believe that his adversary would intentionally take his life. *Employers Indemnity Corporation v. Grant*, 271 Fed. Rep. 136. In this case it was held that where a railway conductor armed himself to scare a passenger out of a toilet, from which he had refused to come on the conductor's orders, and was shot and killed by the passenger before he had time even to threaten with his gun, his death was accidental, within an accident insurance policy, if he had no reason to anticipate that the passenger was armed, or that his action would tend to provoke a fatal encounter.

The Court discusses the authorities and shows that what appears to be conflicting decisions are easily distinguishable by the fact that the deceased did or did not have reason to anticipate the result of the encounter. On this point, the Court said:

"In one group of cases the insured met his death, as the result of an intentional and designed killing of some third person, and if such killing was not the direct result of misconduct of the deceased, or was unforeseen and not reasonably to be anticipated by him, then his death was held to be the result of external, violent, and accidental means. For cases so holding, see the following: *Robinson v. U. S. Mut. Accident Ass'n (C. C.)*, 68 Fed. 825, affirmed on another ground, 74 Fed. 10, 20 C. C. A. 262; *Railway Mail Ass'n v. Moseley* (6 C. C. A.), 211 Fed. 1, 127 C. C. A. 427; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; *Furbush v. Maryland Casualty Co.*, 131 Mich. 234, 91 N. W. 135, 100 Am. St. Rep. 605; on second appeal, 133 Mich. 483, 95 N. W. 55; *Hutchcraft's Ex'r v. Insurance Co.*, 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; *Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; *Ripley v. Railway Passengers' Assurance Co.*, 2 Bigelow, Ins. Rep. 738, Fed. Cas. No. 11,854; *Lovelace v. Travelers' Protective Ass'n*, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638. Of these cases, the one last cited may be taken as typical. Lovelace, the insured, attempted to eject a man, who was drunken and boisterous, from the office of a hotel. In doing so, and in overcoming resistance he used no other means than his hands, and while engaged in the effort the other draw a pistol and shot him, causing death. A recovery on the ground that the death was accidental was sustained, because Lovelace neither used nor attempted to use other than natural, physical means to eject by force, and while so doing did not know,

nor have reason to believe, that the other person was armed.

"There is another group of cases, on which the plaintiff in error mainly relies, in which the assured was killed by a third person, where recovery is not allowed; but in all these cases the deceased engaged in an encounter under such circumstances that he invited his adversary to mortal combat, and either foresaw or should have foreseen that death or injury might result. See *Taliaferro v. Travelers' Protective Ass'n* (8 C. C. A.), 80 Fed. 368, 25 C. C. A. 494; *Hutton v. State's Accident Ins. Co.*, 267 Ill. 267, 108 N. E. 296, L. R. A. 1915E, 127, Ann. Cas. 1916C, 577; *Meister v. General Accident, Fire & Life Ins. Co.*, 92 Ore. 96, 179 Pac. 913, 4 A. L. R. 718. Of these cases *Taliaferro v. Travelers' Protective Ass'n* may be taken as typical. The deceased had drawn a revolver and had struck his adversary in the face before the latter drew his revolver and fired, and it was held that the insured's death was not accidental, because he foresaw or should have foreseen that death or injury might probably result from his own conduct."

INHERITANCE BY AND THROUGH ADOPTED CHILDREN.

Adoption was unknown to the common law and has been grafted by statute on American and English jurisprudence from the Roman civil law. The relation has raised many interesting questions, not the least important of which is the question of the right of inheritance by and through adopted children.

I.—Inheritance by Adopted Child From Adopting Parents and From Natural Parents.—A husband and wife made a deed to their daughter for life, with remainder to her child or children living at her death, and to their heirs and assigns forever, and in default of child or children at her death, then to the heirs generally of the daughter. After the making of the deed the daughter married, but her husband soon died, leaving no children by this marriage. Subsequently the widow adopted a child under the law then in force. When the deed was made there was no law in Illinois providing for the adoption of children. The Court held that it made no difference whether the child was a child within the meaning of

the law or not, for he must take the fee as heir generally of his adopting mother.¹

In Indiana a husband and wife adopted a child and the wife died. Afterwards the husband married again. The Court held that the adopted child took a fee simple in the real estate of the husband, subject to the life estate of the childless widow by a second or other marriage, for, in the eyes of the law it is the child of the adopting father by the adoptive mother. In other words, the adopted child occupied the same position that it would have occupied as to the inheritance, if it had been born to the parents in lawful wedlock.²

Where a husband and wife adopt a child in Louisiana, and move to Iowa, and the adopting father dies there before his father, who leaves an estate in Iowa, the adopted child does not inherit the share which the adopting father would have inherited had he survived his father. The Court bases its decision on the construction of the Louisiana statute and holds that that statute provides that the adopted child can inherit from its adopting parent, but not through him; that the adopting father never owned the property which he would have inherited, because he died before the intestate who lived and died in Iowa, where the land is situated.³ The Court, in the course of its decision, says that the adopted child inherits *from* its adopting parents as though she were his legitimate child. That is, she inherits from him as a legitimate child would, or in the same manner, or to the same extent. But she is not his child or heir, except as fixed by the Louisiana statute. That statute does not say that she is the heir or entitled to recover from the father of her adopted father, or that she shall or can inherit, a part of his estate through her adopted father. Whatever property the latter owned at his death, the adopted daughter

can inherit, but it does not follow that she can inherit property that never belonged to her adopting parent. If the intention had been that she should inherit through her adopting father we think the statute would have so provided. The Louisiana statute is a special act, and the Iowa Court seem to think that they would enlarge or extend the scope and effect of the statute authorizing the adoption were they to give it any other construction. The Iowa Court at the time this decision was rendered was composed of five members, and two of the Judges dissented. In neither the majority nor dissenting opinion was the case of *Vidal v. Commagere*^{3a} referred to. This Louisiana case, construing a special legislative act of adoption, on page 518, quoting from Smith's Commentaries. § 467, says: "*And those (laws) which are made in favor of any persons are to be interpreted in as large an extent as the favor of these motives, joined with equity, is able to give them, and they are not to be interpreted strictly, nor applied in such a manner as to be turned to the prejudice of those in whose favor they were made.*" The Louisiana case, *supra*, in effect, holds that in that State an adopted child not only inherits from the adopting parent, but by the act of adoption becomes the grandchild of the parents of the adopting parent.

The statute of New Hampshire⁴ provides that an adopted child shall bear the same relation to his adopting parents and their kindred, in respect to the inheritance of property, and all other incidents of the relation of parent and child, as he would if he were the natural child of such parents, except he shall not take property expressly limited to the heirs of the body or bodies of the adopting parents. A legatee died during the life of the testator, leaving a natural daughter and an adopted one. The statute of wills contained this provision, touching lapsed legacies: "The heirs in the

(1) *Butterfield v. Sawyer*, 187 Ill. 598.

(2) *Markover v. Krauss*, 132 Ind. 294.

(3) *Estate of Sunderland*, 60 Iowa 782.

(3a) 13 La. Ann 516.

(4) N. H. Laws 1862, C. 2603.

descending line of a legatee or devisee, deceased before the testator, shall take the estate bequeathed or devised, in the same manner the legatee or devisee would have taken it if he had survived." The Court held that the adopted child took as a lineal descendant of the legatee by force of the statute, and was as lawfully in the line of descent as if he were placed there by birth.⁵

In Ohio a different ruling was made.⁶ A will contained the following clause: "I hereby give and bequeath all the residue of my property * * * to be equally divided; one-half to the heirs of my daughter, Refella, deceased wife of John McConica, namely, Wilbert, Thomas, and Charles McConica, and Winnie McConica Fulton."

Wilbert McConica died before the testator, leaving no heirs of his body, but leaving an adopted daughter. The Court held that the legacy to Wilbert lapsed, and that his adopted daughter was not entitled to his share in the estate of his grandfather, the testator. In other words, that the adopted daughter could not inherit through her adopting father. The Court bases its decision on its construction of the statute,⁷ which provides that if a devise of real or personal estate is made to any child or other relative of the testator, and such child or other relative shall die, leaving issue surviving the testator, such issue shall take the estate. "True," the Court says, "§ 3140⁸ provides that such adopted child 'shall be to all intents and purposes the child and legal heir of the person so adopting him, or her, entitled to all the rights and privileges and subject to all the obligations of a child of such person, begotten in lawful wedlock.' But this is far from providing that such adopted child shall be the issue of the adopter, and of his blood and of the blood of his ancestors."

In Kentucky it is held⁹ that where an adopting mother dies before her parent, the

adopted child is not entitled to that share in the estate of the parent, which the adopting mother would have received if living at the death of her parent. The Court was of the opinion that the adopted child could not inherit from any of the kindred of the adopting parents.

Under a will which contains certain bequests to a son of the testator and makes no mention of a child or issue of the son, an adopted child of the son takes nothing if the son dies before the testator.¹⁰ There is no reason why an adopted child may not inherit from its natural parents, and also from its adopting parents. If the first adopting parents have died, the child can be adopted a second time, and inherit from both the first and second adopting parents and from its natural parents at the same time. The second adoption does not destroy the relation created by the first adoption and the legal capacity to inherit created thereby.¹¹ A niece of deceased, had she survived him, would have inherited a part of his estate. She left three children and one of these died prior to the death of the intestate, but left surviving him an adopted daughter. The Court held that the adopted daughter was entitled to the share which her foster father would have received had he been alive at the death of the intestate.¹² The holding in this case is opposite to that in the *Sunderland Case*,^{12a} where it was held that the adopted child could inherit from the foster parent, but not through him. But the Court says that "a careful reading of the opinion" (in the *Sunderland Case*) "indicates the decision was based on the construction of the special act of the General Assembly of Louisiana." The Court concedes that the weight of authority is against its conclusion (citing the Michigan case of *Van Derlyn v. Mack*, and the Tennessee case of *Helms v.*

(5) *Clark v. Clark*, 76 N. H. 551; *Warren v. Prescott*, 84 Me. 483.

(6) *Phillips v. McConica*, 59 Ohio St. 1.

(7) 2 Ann. Ohio Stat. (1897), sec. 5971.

(8) 2 Ann. Ohio (1897), sec. 3140.

(9) *Merritt v. Morton*, 143 Ky. 233.

(10) *Gammons v. Gammons*, 212 Mass. 454.

(11) *Patterson v. Browning*, 146 Ind. 160.

(12) *Shiek v. Howe*, 137 Iowa 249.

(12a) *In re Estate of Sunderland*, 60 Iowa 722.

Elliott), and admits that but for the previous analogous holdings of the Iowa Court a different conclusion might be reached. An adopted child may inherit from its natural relatives and also from its adopting parents. This was the rule of the Civil Law.¹³ There is no reason why a child that has been adopted by others should be cut off from inheriting from its own relatives.¹⁴ Because of the adoption the child acquires certain additional rights, but there is nothing in the act of adoption, which in and of itself takes away other existing rights, or such as may subsequently accrue, except such as is by statute provided.¹⁵ By the act of adoption the child becomes in a legal sense the child of the adopting parent. Nevertheless, he is the child of his natural parents, and the act of adoption does not deprive him of the statutory right of inheriting from his natural parents, unless there is a statute which in terms so provides. Where a father adopted two children of his daughter, and afterwards died, leaving no will, the children so adopted inherited from him as his own children, and also inherited the share of their deceased mother. The law in Missouri is,¹⁶ that when the husband shall die without any child or other descendants in being capable of inheriting, his widow shall be entitled to one-half of the real and personal estate belonging to the husband at the time of his death, absolutely, subject to the payment of the husband's debts. A husband and wife adopted a child and the wife died. Afterwards the husband married again. He died testate, having devised land to his adopted son. His widow claimed half of his estate, on the ground that her husband left no child, within the meaning of the statute. But the Court held,¹⁷ that for all the purposes of inheriting from the adopting parent, the adopted child became, and

was, the lawful child of the adopting parent, and was a *child* within the meaning of the statute above set out, and that the widow was not entitled to one-half of the land.

Inheritance in Two-fold Capacity as Child and Grandchild.—A testator, leaving his property in trust, provided that the trustees, upon the death of all the testator's children, "shall distribute such trust property remaining in their hands to such of my grandchildren as shall then be living, in equal shares, so that none shall take by representative, but all per capita."¹⁸ The testator adopted one of his grandchildren as his own child. This adopted child (in fact, a grandchild) died during the life of the last surviving child of the testator, leaving a son surviving him. This son claimed that as the testator had adopted his father as his own son, he thereby became a grandson of the testator, and consequently entitled to a grandson's share of the testator's estate. But in his will the testator said that having adopted his grandchild as his own child, it was not his intention that he should share in his estate as one of his children, "but that he should take under my will only the share of a grandchild." The Court held that under this clause of the will, the son of the adopted child was not entitled to any part of the testator's estate, on the ground that the testator had disregarded the adoption, so far as the inheritance of his adopted child was concerned, and had provided in his will that he should only take the share of a grandchild.

In a Massachusetts case¹⁹ a person died intestate, leaving as his heirs at law and distributes five daughters and a grandson, the only child of a deceased son. After the death of his son, the intestate adopted his grandson as his child. This adopted son claimed one-seventh part of the estate of the intestate as an adopted son, and also one-seventh part by right of representation

(13) Sandar's Justinian 105.

(14) Humphries v. Davis, 100 Ind. 274.

(15) Wagner v. Varner, 50 Iowa 532.

(16) R. S. Mo. 1919, sec. 32.

(17) Moran v. Stewart, 122 Mo. 295.

(18) Clarke v. Rathbone, 221 Mass. 574.

(19) Delano v. Bruerton, 148 Mass. 619.

of his father. The Court says that "the same person cannot, as to the legal descendants of his adopting parents, stand in the position of his son and at the same time claim to inherit a portion of his property as his grandson. It is to be continually borne in mind that we are not dealing with the question whether Henry Curtis can inherit as a son from his adopting parent, and at the same time inherit directly from his father. If his father left property he would have the right to inherit it. But the sole question is as to the right to inherit the property of his grandfather and adopting father in a double capacity, as his son and as his grandson. He claims the right to inherit, under the first part of the section²⁰ as his son, and under the last clause, because he is included among his 'kindred.' When the Legislature provided that no person should, by being adopted, lose his right to inherit from his natural parents or kindred, we do not think it understood or intended that 'kindred' should include the adopting parent."

The Courts of Pennsylvania on this question held the same way as do those of Massachusetts.²¹ In the course of its opinion the Court says: "The adopted child does not stand on the full footing of an actual child, even as to his legal rights. He has only such rights as the statute clearly gives him. * * * The Act of 1887²² intended to put the adopted child on the same footing as actual children, if such there should be, but not on any more favorable footing. This would be the natural and presumed intent, but it is put beyond question by the proviso. Having enacted that the adopted child shall have 'all the rights of a child and heir,' the framers of the Act, apparently out of caution, lest the word 'heir' should seem to give a preference over other children, added the proviso that he should inherit 'only as one of them.' The Act did not apparently contemplate, certainly did

not expressly provide, for the case of an adoption of a grandchild, but the plain intent that the status of the adopted child should be equal, but not superior, to that of the others, is enough to settle the question." So the Court held, that the adopted grandchild inherited as a child only, and not in a double capacity as child and grandchild.

Inheritance From Kindred of Adopting Parent.—In Wisconsin, a husband and wife adopted a child under the laws of that State, and then moved to Illinois. In the latter State the wife died and thereafter the husband married again, and a daughter was born as issue of this marriage. The second wife died, and soon thereafter the husband died, leaving real estate in Illinois, and also leaving his last will, by which he gave all his property to the child of the second marriage. This child of the second marriage died, leaving no children, no brother or sister, but leaving one grandparent surviving her. The adopted child claimed the property as heir of her adopted sister. The Court held,²³ that she was not the heir of her adopted sister, for the reason that the Illinois law expressly prohibited an adopted child from inheriting property from the lineal or collateral kindred of its adopting parents by right of representation.²⁴ The Wisconsin statute, where the adopted child acquired its status, did not prohibit it from inheriting from the lineal or collateral kindred of its parents, and the Court ruled that the rights of inheritance acquired by the adopted child under the law of Wisconsin will be recognized and upheld in Illinois, only so far as they are not inconsistent with the law of descent of Illinois, so that if by the Illinois statute of adoption the adopted child could not take under the statute of descent of Illinois, then she could not take, no matter what might be the law of Wisconsin in respect to the rights of an adopted child.

(20) Pub. Stats. C. 148, sec. 7.

(21) *Morgan v. Reel*, 213 Pa. St. 81.

(22) Act of May 19, 1887, P. L. 125.

(23) *Keegan v. Geraghty*, 101 Ill. 26.

(24) Ill. Stat. 1874, Sec. 5.

In Pennsylvania an adopting father died before his brother, who died intestate. The Court held that the adopted child could not inherit a share in the estate of the intestate.²⁵ The Court said: "As he is not of the blood of this intestate he cannot inherit from him under the intestate act of 1833; but it is contended that under the statute providing for the adoption of children he can. The seventh section of the act of May 4, 1855, which was amended by the act of May 19, 1887, Stewart's Purdon, page 279, pl. 1, only as to the necessary parties to the adoption proceedings, provided that an adopted child should have all the rights of a child and heir of such adopting parent. It does not, however, give such a child the rights of a nephew or niece, and of a collateral heir of the brothers and sisters of the adopting parent; and if it had the intention to change the intestate acts so that intestate's estate should descend without his consent to a person not of his blood, surely such an intention should have been clearly expressed. It is suggested that if the adopted child has all the rights of a child, it necessarily has the rights of inheritance, as a natural child of the adopting parents. If so the child could inherit as such from the natural children, and it would not have been necessary to provide in the concluding part of the section that the adopted child and other children of the adopting parent should 'inherit from and through each other as if all had been the lawful children of the same parent.' The obvious purpose of the act was to provide for the adoption of children, and to amend the intestate laws only so that the adopted child could inherit from the adopting parent and his children."

In Tennessee, a person died, leaving as survivors a daughter, a grandson, and an adopted son. Afterwards, the grandson died intestate, and the Court held,²⁶ that

the adopted uncle was not entitled to inherit from the grandson, but that the aunt in blood took all of the estate as distributee of the intestate. The Court said: "It is contended that the legal *status* of the adopted child is the same as that of the child born in lawful wedlock, and that as a consequence the same rights as heir and next of kin exist in the one case as in the other—not only as to the parent, but as to all other persons. This position is sound in part only. So far as the parental obligations and the estate of the adopting parent are concerned, it is well taken, but beyond that it is not tenable. As to the estates of other persons than the adopting parent, the law of adoption fixes no right in the adopted child. It is only as to the adopting parent that the adopted child is made 'heir or next of kin' by the statute." By the adoption, the adopted son, became vested with all the rights of heir and next of kin of the adopting father, but he was not thereby made the heir and next of kin of the children born to the adopting father.

In Kansas it has been held,²⁷ that an adopted child cannot inherit the share which her adopting father would have taken in the estate of his brother, had he survived his brother. The Kansas Court bases its decision on the statute of Illinois, where the adoption took place, and the status of the adopted child was fixed, for it says that "the language of the statute of Illinois * * * seems to restrict the right of inheritance given to the adopted child to an inheritance from the parent only." The laws of Illinois²⁸ say that the relation between the adopting parent and child shall be as to their rights and liabilities, the same as if the relation of parent and child existed between them, except that the adopting father or mother shall never inherit from the child; but to all other persons the adopted child stands related as if no such act of adoption had taken place.

(25) *Burnett's Estate*, 219 Pa. St. 59.

(26) *Helms v. Elliott*, 89 Tenn. 444.

(27) *Boaz v. Swinney*, 79 Kan. 332.

(28) *Laws of Ill.*, 1867, p. 132.

In Michigan the Court held,²⁹ that an adopted child cannot share in the distribution of the estate of the brother of its adopting mother, that is, cannot inherit through the deceased adopting mother, her share in her brother's estate. The Court said: "The power to inherit from the adopting mother is given by the statute, and that is as far as the statute goes. It does not say that she shall be the heir of the adopting mother's kindred, nor that she may inherit from them by the right of representation of the adopting mother."

The same rule is followed in Missouri. A bachelor died intestate, leaving surviving him a brother, and nephews and nieces. A brother predeceased him, leaving one son and an heir by adoption. This adopted child claimed that she was an heir of her adoptive father's brother. After a very full discussion of the subject, Judge Lamm says: "The doctrine to be gathered from the foregoing cases is announced to be, in effect, to deny the right of the adopted child to succeed to the estate of any member of the adopting family, other than the adopting parent, and that such adopted child does not succeed to the estate of ancestors or collateral kin of the adopting parent, nor to the estate of children born to the adopting parent."³⁰

Inheriting From Adopted Child.—In Iowa it is held,³¹ that under the general inheritance statutes of the State the heirs of an adopting parent, upon the death of an adopted child, unmarried and without issue, would not inherit the property of such child, but that the same would pass to the natural parents of the child. The Court said: "The attempt to introduce a peculiar rule of descent for property acquired by the adopted child from the adopting parents might seem, in particular cases, to be more in accordance with our general notions of natural justice. Such rule would, however, not only be without statutory authority, but in many cases would unnecessarily lead to the

greatest confusion in its application. Suppose the adopted child should for many years outlive its adopting parent and also its natural parent, having by inheritance derived property from each, and having also accumulated property of its own. How could any court undertake to determine what portion of the estate left by such child goes to heirs in the line of the adopting parent and what portion should go to heirs in the natural line?"

In Missouri it is held,³² that the natural child of an adopted child shares in the distribution of the estate of the adopting parent dying intestate, the adopted child having predeceased the adopting parent. Judge Williams, speaking for the Court, quotes from *Ruling Case Law*,³³ as follows: "If an adopted child dies during the life of its adopting parent, leaving children, such children are for most, if not for all, purposes, regarded as natural grandchildren of the adopting parent, and are entitled to represent their parent and to receive from the estate of his adopting parent what he would have been entitled to receive had he lived until after such parent's death." In the same case, Judge Williams says that the natural child of the adopted child, does not in a proper sense, take under the deed of adoption. The deed of adoption created the status of an inheriting child in the adopted child and the right of the child of the adopted child to represent his father is given by the statute of descents, by the use of the words "or their descendants." In a much earlier case,³⁴ it was held that on the death of an adopted child his estate will go to his relations by blood, and not to those by adoption; and this even where the estate which so descends has been derived from the adoptive parent.

The same rule is followed in Wisconsin, where it is said³⁵ that "the statute having expressly declared that the adopted child

(29) *Van Derlyn v. Mack*, 137 Mich. 146.

(30) *Hockaday v. Lynn*, 200 Mo. 456.

(31) *Baker v. Clowser*, 158 Iowa 156.

(32) *Bernero v. Goodwin*, 267 Mo. 427.

(33) *R. C. L.* 614.

(34) *Reinders v. Koppelman*, 68 Mo. 482.

(35) *Hole v. Robbins*, 53 Wis. 514.

shall inherit from the adoptive parents, and having omitted to declare that the adopted parent shall inherit from the child, we think it must be held, according to the rules of construction, that the general law of inheritance was not intended to be changed in favor of the adoptive parent, and that the estate of the adopted child upon his death without a will, must descend to his kindred of blood."

In Arkansas the adopting parents do not inherit from the adopted child,³⁶ and in Illinois the statute provides that the adoptive parents shall not inherit any property of the adopted child that came to it from its kindred by blood.³⁷ But in South Dakota the contrary is the case,³⁸ and there it is held that the adopting mother took all the real property situated in that State which the adopted child inherited from his kindred by blood.

In Indiana it is held,³⁹ that the adopting parent or his or her heirs inherit from the adopted child all property, real and personal, that came to the adopted child by gift, devise, or descent from the adopting parent or parents, whenever he, she or they would have inherited such property if the adopted child had been the natural child of the adopting father or mother, to the entire exclusion of the natural heirs of such child.

Inheriting Through Adopted Child.—In Vermont an intestate died, leaving a wife surviving him and several brothers and sisters and an adopted daughter. During the life of the intestate the adopted daughter died, leaving surviving her a son. The Court held,⁴⁰ that the son of the adopted daughter, deceased, was entitled to inherit through her by right of representation a share in the adoptive father's intestate estate. The question came up for the first time in the Vermont Court (1912) and the

Court reviewed the authority exhaustively, and said that as the doctrine of adoption was unknown to the common law, but was recognized by the civil law, it was proper to look to the civil law for the proper definition of the term and in aid of the interpretation of the provisions of the Vermont statute on the subject of adoption. The Court quoted from the Vidal Case⁴¹ as follows: "Under the Roman law, the person adopted entered into the family, and came under the power of the person adopting him. And the effect was such that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person."

This same question came up for the first time in the Court of Appeals of Kentucky in 1911, before the Walworth Case, *supra*, was decided, and the Kentucky Court held,⁴² that the child of the adopted child could not inherit the share which his foster mother would have received, if living, from the estate of her mother, who died intestate. The Kentucky case is very brief, and cites two Kentucky cases,⁴³ where it is held that the adopted child is made capable of inheriting from its adopting parents, as if he had been born to them and were in fact their child. But the Court said: "But we are cited to no authority, statutory or otherwise, where it has been held that an adopted child is thereby made capable of inheriting from those who have adopted him." The Court cites other cases⁴⁴ as expressly holding that an adopted child cannot inherit from the collateral kindred of its adoptive parents, nor from the ancestors of such parents, nor from their natural children; and, continuing, the

(40) *In re Walworth's Estate*, 85 Vt. 322.

(41) 13 La. Ann. 516.

(42) *Merritt v. Morton*, 143 Ky. 133.

(43) *Power v. Hafley*, 85 Ky. 671; *Atchison v. Atchison*, 89 Ky. 488.

(44) *Van Meter v. Sankey*, 148 Ill. 536; *Meader v. Archer*, 65 N. H. 214; *Phillips v. McConica*, 59 Ohio St. 1. and *Sunderland's Estate*, 60 Iowa 732.

(36) *White v. Dotter*, 73 Ark. 130.

(37) *Hurd's Rev. Stat.* 1909, C. 4.

(38) *Calhoun v. Bryant*, 28 S. D. 266.

(39) *Davis v. Krug*, 95 Ind. 1.

Court said: "And in Vermont, where by special statute an adopted child is made an heir-at-law in as full and perfect a manner as if born to the adopting parents, it is held that the adopted child cannot become an heir of a brother of his adoptive mother, although she would be an heir if living."⁴⁵ The Kentucky Court then said: "The act of the foster parents in adopting the child is a contract into which they entered with those having the lawful custody of the child, an agreement personal to themselves, and while they have a perfect right to bind or obligate themselves to make the child their heir, they are powerless to extend this right on his part to inherit from others. All inheritance laws are based or built upon natural ties of blood relationship, whereas an adopted child's right to inherit rests upon a contract, and hence only those parties to the contract are bound by it."

In the Walworth Case, *supra*, the Vermont Court said: "The exceptants rely upon the cases of *Moone v. Moone's Exrs.*, *supra*, and *Stanley v. Chandler*,^{46a} as authorities against such right of representation. Yet they are not so. In the *Moone Case* by the special act the name of the person was changed, and she was 'constituted heir-at-law of,' etc., in as full and perfect a manner as if she had been the daughter of the said man and wife named, 'born in lawful wedlock.' The word 'adopt' or 'adoption' is not used in the act, hence a construction based upon the meaning of the term 'adoption' under the civil law, as in the Louisiana case, could not be given; nor did the act confer upon either party, any rights, duties, or obligations other than such as resulted from the mere creation of an heir-at-law. * * * We think that the *Moone Case* and the *Stanley Case* are so distinguishable in bases, and in the questions involved, from the case at bar, that they have but little force as precedents in solving the questions before us."

(45) *Moone v. Moone*, 35 Vt. 98.

(45a) 53 Vt. 519.

In New Hampshire the son of an adopting parent cannot inherit through the adopting parent the estate of the latter's mother, where the adopting parent dies before his mother.⁴⁶

In Georgia, where the testator adopted a child and the child died before the testator, the children of the adopted child stood in their father's place and inherited the share of their father in the testator's estate.⁴⁷

In Kansas an adopted child died intestate, leaving a husband and child, before the death of her adoptive father, who left surviving a widow. The Court held,⁴⁸ that the widower and child inherited the share in the estate of the adoptive father, which the adopted child would have taken had she been alive when he died.

In 1842 the Legislature of Kentucky by a special act authorized one Hafley to adopt a child in which she was made capable of taking and holding, by descent, the estate of her adopting father, real, personal, and mixed, in as full and as complete a manner as if she was his lawful child. After the adoption she married one Power, and several years after her marriage, she died, leaving children. After her death, the adopting father, Hafley, died. The children of the adopted daughter claimed the estate of the adopting father as his legal representatives. The Court held,⁴⁹ that the children of the adopted mother were the legal grandchildren of the adopting father, and as such were entitled to share in the distribution of his estate, under the Kentucky laws of descent.

Do Terms "Child," "Children," "Heirs," "Issue," etc., Include Adopted Children? —The word "heirs" will include all who stand in a relation to the ancestor that will entitle them to inherit upon his death. This would include an adopted child, for the statute puts him on an equality with children by birth for the purpose of inheriting

(46) *Meador v. Archer*, 65 N. H. 214.

(47) *Pace v. Klink*, 51 Ga.

(48) *Gray v. Holmes*, 57 Kan. 217.

(49) *Power v. Halfley*, 85 Ky. 671.

from the adopting parent. By adoption he acquires no right to inherit from anyone else than the adopting parent.

In this case,⁵⁰ the testator devised land to his son, but provided that if his son died leaving no heirs, then the land was to go to other children of the testator. The son died, leaving no children born in lawful wedlock, but left adopted children. When the will was made there was no law in Illinois providing for the adoption of children. The Court held that these adopted children could not have been within the contemplation of the testator, and, therefore, they could not inherit the property devised to their adoptive father.

A testator in a Massachusetts case,⁵¹ in his will devised the remainder to the heirs-at-law of his said wife. When the wife died she left no children, born of her body, but she left an adopted son that she had adopted several years after the testator's death. The Court held, that under the adoption statutes in force at the time the adopted child was not an heir-at-law of the wife, within the meaning of the law, and as there was nothing to show that the testator contemplated that his wife might, after his death, adopt a child, it was impossible to say that, in the words of the statute, it plainly appeared to have been the intention of the testator to include in his devise an adopted child of his wife. He was not the natural heir of the wife, and the statutes did not give him all the qualities and rights of an heir, but only certain limited rights. Where a husband and wife adopt a child and the husband dies, and leaves by his will a tract of land to a child of his adopted child, and restricts his widow (the mother of the adopted child) to that portion of his estate to which she was entitled under the statute, which provides that if the intestate leaves issue the widow shall have one-third of the person-

alty, and if no issue, one-half, the Court held,⁵² that the adopted child was issue within the meaning of the statute and that the widow was only entitled to one-third of the surplus. "The word 'issue' has always been construed to mean a child or children, or their descendants, born of the marriage, and capable of taking at the death of the intestate; but the statute in question has intervened, and, on the application of both husband and wife, the adopted child is made to inherit in the same manner as if a child in fact."

An adopted child can inherit property deeded to his adopting father and his heirs, and not property deeded to his adopting father and his "bodily heirs," because he is not an heir of the body of his adopting father.⁵³ A testator left a fund to trustees to pay the income, in stated proportions, to children and grandchildren, and upon their death to pay their respective portions to their lawful issue, and, if any of them should die without leaving lawful issue, then a gift over. A granddaughter died, leaving no issue of her body, but leaving an adopted daughter. The Court held,⁵⁴ that the word "issue," as used in the will, included all descendants; and as the statute gave to an adopted child the status of a descendant, and all the legal consequences and incidents thereof, the same as though he were born in lawful wedlock, and, hence, the same as "lawful issue," he was entitled to take the fund under the bequest.

A, in 1825, made a voluntary conveyance, without reserving any power of revocation, of personal property to an annuity company in trust, to pay the income to him for life, and upon his death to transfer the principal sum to his executor or administrator, for the special use and benefit of any child or children of A; if only one, in trust for his or her use and benefit; if more than one, for their use and benefit equally, the legal

(50) *Wallace v. Nolan*, 246 Ill. 535.

(51) *Wyeth v. Stone*, 144 Mass. 441.

(52) *Atchison v. Atchison's Exrs.*, 89 Ky. 488.

(53) *Clarkson v. Hatton*, 142 Mo. 47.

(54) *Hartwell v. Telf*, 19 R. I. 644.

representatives to take their parent's share; in case of A's death without leaving any issue, to pay the principal to the mother for her own use; in case A survived his mother and died without leaving any lawful issue, then to pay the principal sum to his executor or administrator in trust for the use of his heirs-at-law, and the heirs-at-law of his mother equally to be divided between them. A subsequently undertook to change the terms of the settlement. In 1865 he adopted a child in pursuance of the laws of the State, and died in 1872, leaving no other child, his mother having died before him.

The Court held,⁵⁵ that A had an equitable life estate and no power to change the terms of the settlement, and that the adopted child took the remainder of the property as a "child" under the settlement as one of the "legal consequences and incidents of the natural relation of parents and children," by virtue of the statute of adoption.

Conclusion.—The law of adoption confers no right upon an adopted child to administer the estate of a deceased adopting parent, or to select an administrator.⁵⁶ It is held in Pennsylvania,⁵⁷ that an adopted child is not exempt from payment of collateral inheritance tax. "It is property devised or descending to children and lineal descendants that is exempt from the tax. If the heirs or devisees are so in fact, they are exempt; all others are subject to the tax. Giving an adopted son a right to inherit does not make him a son in fact. And he is so regarded in law, only to give the right to inherit, and not to change the collateral inheritance tax law. As against that law, he has no higher merit than collateral blood relations of the deceased, and is not at all to be regarded as a son in fact."

(55) *Sewall v. Roberts*, 115 Mass. 262.

(56) *Smith's Estate*, 225 Pa. St. 630.

(57) *Commonwealth v. Nancrede*, 82 Pa. St. 389.

In California,⁵⁸ legacies in trust for the benefit of the children of the adopted daughter of a deceased testator are excepted from the provisions of the law establishing a tax upon "collateral inheritances, bequests and devises."

If the adopted child is by virtue of its status to be regarded and treated in all respects as the child of the person adopting,⁵⁹ and is to have all the rights and be subject to all the duties of the legal relation of parent and child the right to succeed to the estate of the deceased parent must be included. The word "issue" includes all descendants, and as the statute gives to an adopted child the status of a descendant all the legal consequences and incidents thereof follow, the same as though the child was born in lawful wedlock. A child is a lineal descendant of its adopting parents; and if, as declared by the civil code, an adopted child is to be "regarded and treated in all respects as the child of the person adopting" and the two "sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation," it must follow that the children of such adopted child take by inheritance as issue of the adopting father. Otherwise, the child adopted and the adopting parent would not sustain towards each other the relation of parent and child. Again, the act under which the taxes were imposed by the Court below in its title relates to "collateral inheritances, bequests and devises" only, and under the provisions of the Constitution its effects must be limited to the subjects thus described. This would exclude successions or bequests to children and grandchildren, whether adopted, or natural, for clearly they are not collateral, but in direct line.

W. W. HERRON.

Jefferson City, Mo.

(58) *Estate of Winchester*, 140 Cal. 468.

(59) Civil Code, sec. 227.

MUNICIPAL CORPORATIONS — LIABILITY
FOR ASSAULT BY AGENT.

MUNICK v. CITY OF DURHAM.

Supreme Court of North Carolina. April 6, 1921.

106 S. E. 665.

City operating water system was liable for assault by superintendent of the waterworks on consumer's tender of 50 cents in pennies in payment of water bill, since the assault was made by the superintendent while acting in his capacity as agent for the city, and since the city operated such water plant in its business capacity and not in its governmental capacity.

The waterworks in the city of Durham are owned by the municipality and are operated by it under the supervision of the defendant board of water commissioners. Among their employees was one Harvey Bolton, who had general charge and supervision of said water system, and among whose duties it was, assisted by others under his supervision, to keep the books continuing the accounts against all customers purchasing water, to render statements to said consumers for the water used by them and collect all sums due, and to give receipts upon payment of said bills. This is an action by the plaintiff against the city for damages for assault and battery upon him by said Bolton.

CLARK, C. J. The testimony for the plaintiff presents one of the most singular occurrences that has come to this court. The defendant offered no evidence, and the non-suit was granted on the uncontradicted testimony for the plaintiff as above set out. It is therefore taken as true, with all the inferences from it in the most favorable light to the plaintiff. But, indeed, there seems to be but one that could be drawn from it. The plaintiff, an old and feeble man, went to the water company on receiving a notice sent by it to pay his bill. He handed the clerk the money and she gave him a receipt. A part of the payment was 50 "pennies," that is, one-cent pieces, wrapped up together. While he was standing there and she was counting the pennies, the manager of the water company came in, knocked the pennies off the counter on the floor, cursed the plaintiff, calling him a "G—d d—n Jew," told him to pick up the pennies, struck him, pulled him into another room, struck him repeatedly, interrupted this to admit another patron, and after the latter went out the superintendent resumed his beating of the plaintiff, who offered no resistance and begged to

be turned loose to go home, shook him, choked him, put a towel over his face suffocating him, and finally, when the plaintiff tendered a dollar bill, he told him to take his pennies and to leave and not come back.

The official (Bolton) was indicted in the criminal court and convicted and merely fined. Taking this occurrence to be as stated by the plaintiff, who is not contradicted and who proved a good character, a more brutal and unprovoked assault could not be presented. It was absolutely without justification. The pennies, under the United States statute, were a legal tender to the amount of 25 cents (U. S. Compiled Statutes 1918, § 6574), and if the clerk had objected the water company could not have been compelled to receive beyond that sum in pennies, but it was no offense to tender a larger sum in one-cent pieces, and the lady clerk accepted them; and even if the tender of 50 of them was for any reason objectionable (which does not appear), it certainly did not justify the treatment the plaintiff received.

There is no explanation of the conduct of the company's superintendent, and the only provocation given which we can infer from the language used by Bolton is the fact that the plaintiff was a Jew. He made no other charge. The treatment which the plaintiff received is paralleled by that which is portrayed by Scott in *Ivanhoe* in the treatment of Isaac of York seven centuries ago, and by Shakespeare as meted out to Jews in the *Merchant of Venice*, also centuries ago. The world has long outlived this treatment of an historic race, except, perhaps, in "darkest Russia" when under the Czars. When Disraeli, later Prime Minister of the British Empire, was reproached in Parliament for being a Jew, he made the memorable reply, "When the ancestors of the right honorable gentleman were painted savages roaming naked in the forests of Germany, my ancestors were princes in Israel and high priests in the temple of Solomon."

Every voter, every witness, and every official takes an oath upon a sacred book, every sentence and word in which was written by a Jew. When the Savior was incarnated after the flesh he was of the tribe of Judah, and His mother, whom a great church holds immaculate, if not divine, has her name borne by millions throughout the civilized world. Whatever the shortcomings of any individual, it is strange that in this day of enlightenment such prejudices as were shown in this case should survive against the race to which the plaintiff belongs. This plaintiff proved, with-

out contradiction, a good character, and certainly there is no evidence which justified in any degree the brutal assault made upon him, for which no excuse is offered. For some unexplained reason, the brutal assailant, though convicted, was punished only by a fine. It is to be presumed, however, that the city discharged him from its service.

The ground upon which the nonsuit was asked and allowed, as presented in this court, is that the defendants and the city of Durham are not responsible for the act of its agent, Harvey Bolton, superintendent of the waterworks, or that at least in making the assault he was not within the scope of his authority, in that he had no instructions from the defendants to commit such violence. At the time that the assault was made by the said Harvey Bolton he was acting in his capacity as agent. Had he been acting for a water company under private ownership, it could not be contended that the corporation would not be responsible. He was there in the prosecution and furtherance of the duties assigned to him by the defendant municipality. *Roberts v. Railroad*, 143 N. C. 179, 55 S. E. 509, 8 L. R. A. (N. S.) 798, 10 Ann. Cas. 375. Indeed, the facts are very similar to those in *Bucken v. Railroad*, 157 N. C. 443, 73 S. E. 137. "Acting within the scope of employment means while on duty." *Cook v. Railroad*, 128 N. C. 336, 38 S. E. 926.

In *Ange v. Woodman*, 173 N. C. 33, 91 S. E. 586, it is said:

"It is now fully established that corporations may be held liable for negligent and malicious torts, and that responsibility will be imputed whenever such wrongs are committed by their employees and agents in the course of their employment and within its scope * * * in many of the cases, and in reliable text-books * * * 'course of employment' is stated and considered as sufficiently inclusive; but, whether the one or the other descriptive term is used, they have the same significance in importing liability on the part of the principal when the agent is engaged in the work that its principal has employed or directed him to do and * * * in the effort to accomplish it. When such conduct comes within the description that constitutes an actionable wrong, the corporation principal, as in other cases of principal and agent, is liable not only for the act itself, but for the ways and means employed in the performance thereof."

This court has often held the master liable, even if the agent was willful, provided it was committed in the course of his employment. *Jackson v. Tel. Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

Indeed, the doctrine goes further, and the principal is liable if one coming on the premises in connection with business dealings, or

by invitation, is assaulted by one of its agents. This is settled by the leading case of *Daniel v. Railroad*, 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485, and the numerous citations to the case in the Annotated Edition. Indeed, the same ruling has been uniformly made and was reaffirmed at this term in *Clark v. Bland*, 106 S. E. 491.

Not only is the corporation liable for injuries thus committed by its agents, but "It is the duty of a carrier to protect its passengers from injury, insult, violence, and ill treatment from its servants, other passengers, or third persons." *Seawell v. Railroad*, 132 N. C. 859, 44 S. E. 611.

That the corporation is liable for the mistreatment of one invited upon its premises as this plaintiff was, or even if it fails to protect him as far as it can from violence by others while upon its premises, is beyond controversy. Indeed, the principle is so well settled that it needs no citations of authority.

We apprehend, however, that his honor did not nonsuit the plaintiff upon any views to the contrary, but doubtless upon the ground that the city was not liable. That contention by the defendant is equally untenable.

The distinction is very broad and clear and is settled by all the authorities substantially as follows: Wherever a city is exercising a governmental function or police power, it is not responsible for the torts or negligence of its officers, in the absence of a statute imposing such liability; but when it is acting in its business capacity, as in operating a water or lighting plant, or other business function, it is liable for the conduct of its agents and servants exactly to the same extent that any other business corporation would be liable under the same circumstances. The distinction thus laid down in *McIlhenney v. Wilmington* has been often cited with approval.

To sum up: The assault upon the plaintiff was of the most brutal and unprovoked nature. Indeed, there is no evidence set up in this case that tends to palliate or mitigate the assault, which, it appears, was entirely unprovoked. There is no question that Bolton was the officer of the corporation and was acting in the discharge of his duty, and that the plaintiff was on the premises at the invitation of the corporation, and, further, it was the duty of the corporation, not only to refrain from assaulting or injuring the plaintiff while there, but to protect him from any violence which it could reasonably have foreseen if offered by others; and, still further, the city operating the water plant in its business capacity and not under its governmental or po-

lice power, on these facts the same liability was imposed upon the city as if it were a business plant.

The judgment entering a nonsuit must be reversed.

NOTE.—Liability of Municipality in Operation of Waterworks.—In furnishing water to private consumers, a city is acting in a private business capacity, and is bound to exercise ordinary care, and for failure to exercise ordinary care, it is liable for injuries proximately caused thereby to the same extent that a private person or corporation operating a waterworks system would be liable. *State Journal Printing Co. v. Madison*, 148 Wis. 396, 134 N. W. 909; *Nemet v. Kenosha*, Wis., 172 N. W. 711; *Flutmus v. Newport*, 175 Ky. 817, 194 S. W. 1039; *Murray v. Boston*, 219 Mass. 501, 107 N. E. 416; *Henry v. Lincoln*, 93 Neb. 331, 140 N. W. 664; *Coleman v. La Grande*, 73 Ore. 521, 144 Pac. 468; *Bjork v. Tacoma*, 76 Wash. 225, 135 Pac. 1005.

"It has been repeatedly held in the application of the well-settled distinction between public and private functions, that the establishment and maintenance of a system of water supply in part for the use of inhabitants who pay for the necessity thus supplied is a commercial venture, and that for negligence in connection therewith the city or town is liable as a private corporation would be in performing a similar service. *Pearl v. Revere*, 219 Mass. 604, 107 N. E. 417. Thus, a waterworks system owned and operated by a municipality renders the city liable for negligent mismanagement thereof resulting in injury, and this is true, it has been held, where damage resulted from the bursting of a water main due to negligence of the city's servants, notwithstanding such main was used for fire protection, where it appeared the fire department had no control over the waterworks system. Nor does it change the liability in the least, although a portion of the water is used in part for public purposes. 8 *McQuillin, Mun. Corp.*, sec. 2680, citing *Blake-McFall Co. v. Portland*, 68 Ore. 126, 135 Pac. 873; *Simon v. New York*, 82 Misc. 454, 143 N. Y. Supp. 1097.

CORRESPONDENCE.

A TRUSTEE IN BANKRUPTCY WHO TURNED A BANKRUPT BUSINESS IN- TO A SOLVENT GOING CONCERN:

Editor, CENTRAL LAW JOURNAL:

There were several errors regarding the amounts of the allowance in your story of the case of the Yaryan Rosin & Turpentine Company (92 Cent. L. J. 405). They are traceable to the error in the newspaper article I sent you. The trustee in bankruptcy received \$15,000, and in addition thereto received, during the administration in bankruptcy, \$16,000, making a total of \$31,000. The counsel for the trustee in bankruptcy (the writer) received the

sum of \$24,000 additional compensation and the amount of the monthly retainer fixed by contract with the trustee. See 270 Fed. 710.

I think that justice to all concerned would require that this statement be made in an early issue of your publication.

Yours truly,

MAX ISAAC.

Brunswick, Ga.

HUMOR OF THE LAW.

"My son, you should learn to practice self-restraint."

"That's old stuff, Dad. Don't you know that the reformers are doing all the restraining that anybody could possibly need."—*Judge*.

A college education was deemed worthy of the son of a profiteer, and when he came home for the holidays he was questioned by his fond parents as to the nature of his studies.

"Well, father," said the son, "I've been learning arithmetic."

"Yes, well," said the father impatiently, a little disappointed.

"And French, German, Euclid," went on the son.

"Ah, yes," returned the father joyfully, "that's better. Now just tell me the Euclid for 'good morning'."—*Exchange*.

Maud Muller on a summer's day
Went on a strike for higher pay.

So laying down her trusty rake,
She gave the harvest field the shake.
She showed the boss her union card,
And said that times were getting hard.
The cost of living was so high
That she was hardly getting by.

And, furthermore, the price of hay
Would justify a raise in pay.
And if refused her just demands,
She'd call out all the hired hands.
The farmer who in anger roared,
Referred her to the Labor Board,
Who passed the buck to Warren G.,
Who passed it to a commit-tee,
Composed of wise and learned men,
Who promptly passed it back again.
Whereat Maud Muller said, "Oh, fudge!"
And got herself elected judge.
And now besides her princely pay
She gets her rake-off every day.

—L. C. Davis, *Post-Dispatch*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Bankruptcy**—Petition to Revise.—A petition to revise opens only questions of law, and the appellate court cannot review the decision of the District Court on a question of fact.—*Yaryan Rosin & Turpentine Co. v. Isaac*, U. S. C. C. A., 270 Fed. 710.

2. **Banks and Banking**—Forged Check.—If a depositor is guilty of negligence in not discovering and giving notice of a forgery, then the bank might thereby be prejudiced because it is prevented from taking steps, by the arrest of the criminal, or by attachment of his property, or any other form of proceedings, to compel restitution; and it is for the jury to say whether the bank has been deprived of or delayed in the exercise of any rights, the practical effect of which will enable it to protect itself.—*Bank of Black Rock v. B. Johnson & Son Tie Co.*, Ark., 229 S. W. 1.

3.—**Status Apart From State**.—Pursuant to constitutional and statutory enactments, the Bank of North Dakota, as an agency of the sovereign power, engaged in the banking business, has a distinct status separate and apart from that of the state itself. This status permits it to function as a distinct and separate agency of the sovereign power.—*Sargent County v. State*, N. D., 182 N. W. 270.

4. **Bills and Notes**—Attorney's Fee.—A stipulation for payment of a reasonable attorney's fee, if the obligee in a contract should employ an attorney to enforce or defend his rights thereunder by reason of the obligor's breach, is

not in the nature of a penalty, and it is competent for contracting parties, not only to stipulate for a reasonable attorney's fees to be paid by the maker of a note in the event of collection by an attorney after default, but to fix the amount of the reasonableness of such fee; the prima facie presumption being that an amount fixed by them is reasonable.—*Vinyard v. Republic Iron & Steel Co.*, Ala., 87 So. 552.

5.—**Corporate Note**.—A stockholder who is also an officer and director in a Missouri corporation, and who, without receiving any direct consideration therefor and without any language of qualification, signs his name on the back of a note given in Missouri by the corporation to itself to be negotiated for the purpose of procuring money for the corporation, is liable under the Missouri Negotiable Instruments Law as an indorser, and is entitled to notice of dishonor on non-payment of the note.—*Crane v. Downs*, Kans., 196 Pac. 600.

6.—**Purchaser Before Maturity**.—If a note did not contain an acceleration clause, and had not matured because of failure to pay accrued interest, a purchaser thereof in good faith for value was a purchaser before maturity for value.—*Taylor v. Buckner*, Ore., 196 Pac. 839.

7. **Brokers**—Expenses.—While no commissions are recoverable by a broker, where they are based on the amount received for the land by the owner, and the sale has failed through no fault of the owner, the broker may nevertheless recover expenses incurred by the owner's authority in securing options to cancel leases to enable the owner to deliver possession to the prospective buyer.—*Lee v. Greenwood Agency Co.*, Miss., 87 So. 485.

8. **Carriers of Passengers**—Loss of Baggage.—Where a passenger, about to enter a Pullman car, was detained about two minutes outside to have his ticket examined, while a station porter carrying his hand bag entered the car, the carrier cannot be held liable, his bag not having been found, on the theory that its servants should have kept their eyes on it, for such vigilance is not required of the carrier.—*Sneddon v. Payne*, N. Y., 187 N. Y. S. 185.

9.—**Pullman Conductor not a "Passenger" or "Employee"**.—One in the employ of the Pullman Company as conductor, under a contract whereby he ratified a contract between his employer and the railroad company and agreed that he should not have the rights of a passenger, and that it should not be liable for any injuries sustained by him, was not an "employee" or a "passenger" of the railroad company, but sustained a special contractual relation; the liability for injuries to the Pullman company's employees, not pertaining to the public duty resting on the railroad company as a common carrier, but arising solely from the contract.—*Cato v. Southern Ry. Co.*, Ga., 106 S. E. 272.

10.—**Res Ipsa Loquitur**.—Where passenger's injury resulted from slipping on a small piece of ice on the step box on which she stepped when alighting from the car, the doctrine of res ipsa loquitur did not apply to throw the burden of showing freedom from negligence on the carrier, no contention being made that the step box was defective, and it appearing by plaintiff's own witness that there was no ice on the box when it was placed on the platform.—*Heck v. Northern Pac. Ry. Co.*, Mont., 196 Pac. 521.

11.—**Schedule of Rates**.—The filing of a proposed schedule of rates with the Railroad commission by a road prior to enactment of Pub. Acts 1919, No. 382, did not authorize an increase of rates in excess of those fixed in the franchise in view of Pub. Acts 1909, No. 300, § 3, subd. (c), 2 Comp. Laws 1915, § 8109 et seq., declaring that it does not authorize the Commission to impair any existing franchise.—*Humphrey v. Detroit, M. & T. S. L. Ry.*, Mich., 181 N. W. 975.

12. **Chattel Mortgages**—Annulment of Sale.—Where the mortgagee gave no authority to the mortgagee to purchase at his own sale, a foreclosure sale at which the mortgagee was the

purchaser, and at which much of the mortgaged property was not present, some of it being in the adjoining county, and at which all the property was sold en masse for a lump sum, was properly set aside and annulled, and the mortgage allowed to exercise his equity of redemption.—*Chenault v. Milan*, Ala., 87 So. 537.

13. **Commerce**—Liquor Transportation.—By the Reed Amendment, Congress reassumed exclusive jurisdiction over regulation of interstate liquor transportation.—*People v. Keeley*, Mich., 181 N. W. 990.

14. **Contracts**—Pawnbroker.—Where plaintiff seller intrusted a prospective purchaser with possession of a watch for the purpose of making a sale, the purchaser must be deemed the true owner thereof, to the extent that her contract of pledge with a pawnbroker is binding on the seller.—*Kupchick v. Levy*, N. Y., 187 N. Y. S. 192.

15.—Test of Water Well.—In view of Acts 36th Leg. (1919) c. 130, where plaintiff contracted to bore for defendant a water well yielding sufficient water to fill 30 barrels each day, the word "barrel" as used in the contract meant a barrel of 31½ gallons, the standard United States measure except as to barrels of petroleum, and the provisions of the contract giving defendant right to test the capacity of the well for not exceeding 90 days did not give her absolute power to determine unappealably whether there was insufficient water.—*Pope v. Joschke*, Tex., 228 S. W. 986.

16. **Corporations**—Certificate to do Business.—General Corporation Law, § 15, requiring foreign corporations to procure a certificate authorizing the doing of business in the state, is repugnant to the commerce clause of the Federal Constitution, and void as applied to transactions in interstate commerce.—*Publiker Commercial Alcohol Co. v. Roberts*, N. Y., 187 N. Y. S. 178.

17.—Provision of Charter.—Under St. 1919, § 1776, providing that the directors of stock corporations shall choose a president and such other officers as the corporate articles and by-laws require, all officers designated by the articles or by-laws are to be elected by the directors, and a provision of the corporation's charter for their election by the stockholders is in conflict with the statute which governs the election.—*State v. Rosenow*, Wis., 182 N. W. 324.

18.—Rescission of Contract.—Stock subscriber, by demanding stock and advertising it for sale, did not waive the right to annul notes given for a portion of the purchase price retained by the corporations which failed to issue the stock or return notes for the balance of the purchase price, where suit to rescind was brought within five days after the corporation had returned another of his notes.—*Lynch v. Des Moines Life Finance Co.*, Iowa., 182 N. W. 215.

19.—Valid obligations.—Where the treasurer of a coal company contracted for the purchase of all of its stock, and pursuant to the contract took over the management of its business on behalf of himself and his associates in the purchase, but owing to default in payment the contract was not carried out, notes given by him in the name of the company, without authority of the directions for money advanced by one of his associates, which was not used in the business of the company, but was paid for stock under the contract, held not to be valid obligations of the corporation.—*Murray v. Shipman Coal Co.*, U. S. C. C. A., 270 Fed. 740.

20. **Counter**—Road Bond Issue.—Where the fiscal court of a county, in calling an election on a road bond issue, directed that the proceeds of the bonds to be voted should be used to construct or reconstruct roads, bridges were necessarily included.—*Crick v. Rash*, Ky., 229 S. W. 63.

21. **Covenants**—Warranty.—Where land was conveyed twice with a deficiency in acreage, the

ultimate grantees had legal right to sue the first grantor on his covenants of warranty to his grantee, or to sue such grantee, their own grantor, of the covenants contained in his deed to them.—*Martin v. Jones*, Mo., 223 S. W. 1051.

22. **Criminal Law**—Disorderly Conduct.—It was "disorderly conduct" for one, called to the door of her home at night by police officers making inquiry about matters in their line of duty, to curse them, slam the door, and order them away.—*Whitten v. Mayor and Aldermen of Savannah*, Ga., 106 S. E. 302.

23. **Damages**—Mental Anguish.—Defendant's carelessness and negligence, in publishing a picture of plaintiff's son in connection with a report of the death of a person having the same name, gave no right of action for the mental pain and anguish suffered by plaintiff from the supposed death of her son, where the publication of the picture was not done wantonly or from wrong motives or in willful disregard of plaintiff's parental feelings.—*Herriek v. Evening Express Pub. Co.*, Me., 113 Atl. 16.

24. **Divorce**—Alimony.—Alimony may be awarded the wife in a divorce proceeding, although the husband is without property and must support himself and pay the alimony out of his future earnings.—*Ramsay v. Ramsay*, Miss., 87 So. 491.

25.—Clean Hands.—Where the court found that plaintiff was guilty of the same misconduct she had charged against defendant, a dismissal of the bill for divorce was proper; a divorce not being granted under a rule of comparative rectitude or turpitude.—*Hatfield v. Hatfield*, Mich., 181 N. W. 968.

26. **Fish**—Ownership.—Rev. St. Mo. 1909, § 6508, providing that "the ownership of and title to all birds, fish and game . . . not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed, . . . or had in possession, except the person so catching, taking, killing or having in possession shall, consent that the title of said birds, fish and game shall be and remain in the state of Missouri for the purpose of regulating and controlling the use and disposition of the same after such catching," etc., is a statute of regulation only, and leaves private ownership unimpaired, except as to the right of the state to prescribe the seasons and conditions under which fish and wild game may be taken, used, and disposed of.—*Gratz v. M'Kee*, U. S. C. C. A., 270 Fed. 713.

27. **Fixtures**—Removal.—Where buildings were placed on the leased premises by the tenant and continuously assessed as personalty and the taxes paid by the tenant, who kept the buildings insured, the structures erected and the machinery contained in the buildings being suitable for and devoted to a business purpose, the tenant without express stipulation in the lease, had the right to remove all of such fixtures and the machinery contained in them at or before lawful expiration of his term.—*Dougan v. H. J. Grell Co.*, Wis., 182 N. W. 350.

28. **Injunction**—Violation of Contract.—Equity has jurisdiction to enjoin violation of a contract relating to personalty, where special circumstances are alleged showing that the remedy at law is not adequate.—*Hawaiian Pineapple Co. v. Saito*, U. S. C. C. A., 270 Fed. 749.

29. **Insurance**—Default of Mortgagee.—Where a mortgagee was made a defendant but defaulted and it appeared that a prospective purchaser had paid two-thirds of the mortgage, the insurer cannot defeat recovery on the ground that payment should be made to the mortgagee.—*Ellis v. Home Ins. Co.*, Kan., 196 Pac. 598.

30.—Liability for Payment by Insured.—Where plaintiff partnership, carrying liability insurance with defendant surety company, had contracted to indemnify the mining company, whose mine the partnership leased, against loss, damages, or negligence, and the mining company, having settled suits against it for deaths of miners resulting from the operation of the mine by the partnership, sued and recovered

judgment against the partnership for the amount paid by the mining company for which it recovered judgment against the partnership.—*Harndon v. Southern Surety Co., Mo.*, 229 S. W. 291.

31.—**Time Limit.**—A condition in an insurance policy providing that no recovery shall be had thereon unless suit is brought within "two years from the time within which proof of loss is required by the policy" is valid, and no recovery can be had on a policy containing such a condition when the action is not brought within the time specified in the policy, unless the provision is waived or there is valid excuse for delay.—*Gallivitoch v. Provident Life & Accident Ins. Co., Ga.*, 106 S. E. 319.

32.—**Intoxicating Liquors.**—Insufficient Bill.—Though Acts 1915, p. 31, defines prohibited liquors and beverages, a bill seeking condemnation of automobile alleged to have been used for transportation of prohibited liquors and beverages is sufficient, and not too general, though not averring whether they were spirituous, malt, or vinous.—*Black v. State, Ala.*, 87 So. 527.

33.—**State Laws.**—There is nothing in the Constitution of the state of Texas which denies to the Legislature the power to enact laws forbidding the manufacture or sale of intoxicating liquor, or even liquors with insufficient alcoholic content to produce intoxication.—*Russell v. State, Tex.*, 228 S. W. 948.

34.—**Unlawful Search.**—Liquor found and seized by a prohibition agent through an unlawful search of a private garage cannot be used as evidence to convict the owner of the garage of an offense, or for the forfeiture of his property if petition for its return is presented to the court before trial, and the fact that city police officers aided in the search is immaterial.—*United States v. Slusser, U. S. D. C.*, 270 Fed. 818.

35.—**Landlord and Tenant.**—Portion of Premises.—Where the lessor of a store building delivered to the tenant keys to the basement, and occupancy of the basement was essential to enjoyment of the store building, the tenant cannot be ousted from possession after occupancy for several years, on the theory that he was a squatter with respect to the basement, but the basement will be deemed to have passed with the lease of the store.—*Florgus Realty Corporation v. Reynolds, N. Y.*, 187 N. Y. S. 188.

36.—**Summary Proceeding.**—Where, in summary proceedings, the landlord incurred expenses in removing the tenant's property from the premises, by paying men hired by the marshal to put him in possession, and sought to recover such expenses, such facts held not to make the landlord responsible for the acts of the marshal or those employed by him in damaging property; the writ under which the marshal acted being valid.—*Ide v. Finn, N. Y.*, 187 N. Y. S. 202.

37.—**Master and Servant.**—Bonus.—Bonus of year's wages to servant of decedent should be computed on wage scale at time of death.—*Gray v. Richards, Me.*, 113 Atl. 9.

38.—**Amount of Compensation.**—The fact that an injured employee received more wages since the injury than he was earning at the time of the injury does not preclude compensation if he has been unable, by reason of the injury, to follow the particular employment he was engaged in when injured.—*Woodcock v. Dodge Bros., Mich.*, 181 N. W. 976.

39.—**Contributory Negligence.**—An elevator operator, who left his elevator at the street floor of a building and, upon his return, after another operator had moved the elevator, ran to the shaft, pushed open the door, and stepped in, held as matter of law guilty of contributory negligence proximately causing his death.—*Page v. New York Realty Co., Mont.*, 196 Pac. 871.

40.—**Course of Employment.**—Where 15-year old boy entering a freight elevator to return to his work from a floor visited during an interval of leisure was killed by the movement of the elevator when he turned on the power, previously shut off by himself as a joke on a companion who was coming up and failed to

disengage the switch on the elevator when it stopped between the floors, an award under the Workmen's Compensation Act was justified on the theory that the accident occurred "in the course of employment."—*Twin Peaks Canning Co. v. Industrial Commission, Utah*, 196 Pac. 853.

41.—**"Hazardous Occupation."**—A school-teacher, carrying on chemical experiments prescribed by the Education Law, is not engaged in "hazardous occupation," within the meaning of Workmen's Compensation Law, under Const. art. 1, § 19.—*Beeman v. Board of Education of Penn Yan, N. Y.*, 187 N. Y. S. 213.

42.—**Injury in Parade.**—Where decedent was driving a team in a parade in honor of employees who had enlisted in the military service as his voluntary act and his individual contribution towards the parade, and it was not held during working hours and he was not under pay at the time, compensation for his death from falling under the wheels of his wagon was properly disallowed.—*Hutno v. Lehigh Coal & Navigation Co., Pa.*, 113 Atl. 68.

43.—**Interstate Commerce.**—An employee working in an ash pit in railroad yards, cleaning engines used in both interstate and intrastate business, who, on leaving his work, instead of taking a stairway to the street provided by the railroad company, for his own convenience walked across the yard and tracks, as other employees did, but following no defined way, and was struck and killed by a train on a main track, held to have ceased his employment in "interstate commerce" within the meaning of Employers' Liability Act, § 1 (Comp. St. § 8657), when he left his work and deviated from the way provided for his departure.—*Krysiak v. Pennsylvania R. Co., U. S. C. C. A.*, 270 Fed. 758.

44.—**Partial Incapacity.**—An injured employee was not entitled to recover under Workmen's Compensation Act for partial incapacity after the date on which he became able to earn in a suitable employment an amount equal to that earned before the injury, although his physicians advised him to do light work, for the reason that it would be beneficial and helpful in restoring him to health.—*Voight v. Industrial Commission, Ill.*, 130 N. E. 470.

45.—**Right to Choose Physician.**—An injured servant has the right to choose his own physician under the Workmen's Compensation Act.—*Snyder v. Industrial Commission, Ill.*, 130 N. E. 517.

46.—**Student of Telegraphy.**—When the operator and agent in charge of a railroad station requests the superintendent to employ a helper, and is refused, but is subsequently given permission to take a young man into the office to learn telegraphy and to assist in the performance of the duties in and about the office, who does in fact so assist under the orders and direction of such agent, the relation of master and servant is thereby created and the doctrine of respondeat superior applies.—*Schnable v. Cleveland, C. & St. L. Ry. Co., O.*, 130 N. E. 510.

47.—**Tort of Servant.**—"Every person shall be liable for torts committed by his * * * servant, by his command or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary." Civil Code 1910, § 4113. Where a servant departs from the prosecution of his business and commits a tort while acting without the scope of his authority, the person employing him may still be liable if he failed to exercise due care in the selection of his servant.—*Renfroe v. Fouché, Ga.*, 106 S. E. 303.

48.—**Monopolies.**—Conditional Sale.—The provision of Clayton Act, § 3, making it unlawful to lease or make a sale, or contract for sale, of goods on condition that the lessee or purchaser shall not deal in the goods of a competitor of the lessor or seller, is limited to contracts of lease or sale by the clear meaning of its terms, and especially in view of its purpose to make invalid certain contracts of lease or sale of patented articles which the Supreme Court had shortly before held to be valid.—*Curtis Pub. Co. v. Federal Trade Commission, U. S. C. C. A.*, 270 Fed. 881.

49. **Municipal Corporations**—Abolishing Corporate Existence.—If the provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 1079, that, at an election as to abolishing the corporate existence of a municipality, all legally qualified voters, who are resident taxpayers, "as shown by the last assessment roll," shall be entitled to vote, is invalid, its invalidity does not destroy the entire statute.—*Bonham v. Fuchs*, Tex., 228 S. W. 1112.

50.—**Violation of Gas Contract**.—An inhabitant of a city, who suffers damages because of gas company's violation of contract with city specifying the quantity and pressure of gas to be furnished to the inhabitants of the city, may sue the company in his own name; the contract having been made for the use and benefit of the inhabitants of the city as well as for the city itself.—*Humphreys v. Central Kentucky Natural Gas Co.*, Ky., 229 S. W. 117.

51. **Negligence**—Invitee.—Damages may be recovered by a person who is injured while seeking employment in a manufacturing establishment, if he goes to the superintendent of the establishment to procure employment and is directed by him to see the foreman and is told where to go, and, while attempting to find the foreman at the place indicated, is injured through negligence for which the establishment is responsible.—*Zeigler v. Oil Country Specialties Mfg. Co.*, Kan., 196 Pac. 603.

52. **Partnership**—Division of Profits.—Contractors, one of whom agreed to bid on a contract and procure the contract, furnish bond and the necessary capital, and the other of whom was to do the work and employ all the men, the profits to be divided, held partners.—*Minter v. Gidinsky*, Mo., 228 S. W. 1075.

53. **Physicians and Surgeons**—Honest Mistake.—Where a surgeon possesses the requisite qualification and applies his skill and judgment with ordinary care and diligence to the diagnosis and treatment of the patient, he is not liable for an honest mistake or for an error of judgment in making a diagnosis or in prescribing a mode of treatment, where there is ground for reasonable doubt as to the practice to be pursued.—*Kelly v. Hollingsworth*, S. D., 181 N. W. 959.

54. **Principal and Agent**—Authority of Agent.—A traveling salesman or drummer ordinarily has no ostensible or implied authority to make a binding contract without the approval of his principal; the extent of his authority being merely to solicit orders and transmit the same to his principal for acceptance.—*Bagot v. Inter-Mountain Milling Co.*, Ore., 196 Pac. 824.

55. **Railroads**—Lookout.—It is the duty of those in charge of a train backing on an interchange track in railroad yards to keep a lookout for laborers required to be on the track.—*Alabama, T. & N. R. Co. v. Huggins*, Ala., 87 So. 547.

56. **Sales**—Countermand of Order.—An order for the purchase of goods, containing the words, "not subject to countermand," may nevertheless be countermanded at any time before acceptance, for, until accepted by the salesman's principal, it is simply an offer to purchase, and in no way creates a binding agreement.—*Night Commander Lighting Co. v. Brown*, Mich., 181 N. W. 979.

57.—**Subsequent Agreement**.—In an action for the balance of sale price of books where the original contract provided that upon payment of a specific amount the books could be returned, and after offer to return after payment of such amount, another agreement was made whereby the purchaser made further payment of installments, held that the further agreement was made in view of preserving all rights under the former contract, including that of election to return the books, and that the purchaser made timely offer thereof.—*Edward Thompson Co. v. Dillon*, Wash., 196 Pac.

58.—**Severable Contracts**.—Defendants agreed to sell five cars of potatoes and two cars of onions, different prices being specified. It was arranged that plaintiff should have on deposit sufficient money to pay for the shipments on presentation to bank of bill of lading. Held,

that the sale of the potatoes and of the onions was severable, and, though at the time the potatoes were loaded plaintiff did not have on deposit sufficient funds to pay therefor on presentation of bill of lading, yet, as sufficient funds were deposited on the following day, defendants, who had loaded no onions, were not justified in treating the contract as broken and refusing to deliver onions.—*Weathered v. Hirai*, Wash., 196 Pac. 572.

59. **Searches and Seizures**—Waiver of Objection to Search.—Consent of the owner that a person announcing himself a prohibition agent showing a badge and demanding the right might search premises held not a waiver of constitutional right to protection against unreasonable search.—*United States v. Slusser*, U. S. D. C., 270 Fed. 818.

60. **Telegraphs and Telephones**—Interstate Message.—A telegraph message between two points in the state, unnecessarily transmitted through another state, is an interstate message, and not subject to state law permitting damages for delay of death message, preventing receiver from attending relative's funeral.—*Son v. Western Union Telegraph Co.*, S. C., 106 S. E. 507.

61.—**Recovery of Property**.—Where a telephone company without authority ran its line over plaintiff's property, plaintiff may maintain an action to recover his property and compel the removal of the line, notwithstanding the government for temporary war purposes had taken control of telegraphs and telephones, for the possession of the government did not afford any reason why the landowner should not have his rights adjudicated, particularly as he could not interfere with the government's possession, and at the time of trial the government had returned the property to private ownership.—*McPhillips v. New York Telephone Co.*, N. Y., 187 N. Y. S., 183.

62. **Vendor and Purchaser**—Innocent Purchaser.—If one purchased land for a valuable consideration without knowledge that fraud had been practiced by his vendor upon the parties from whom the land was secured and without knowledge of facts and circumstances sufficient to put an ordinarily prudent man upon inquiry as to the manner in which vendor procured the land, such purchaser must prevail over vendor's predecessors in title.—*Whitford v. Dodson*, S. D., 181 N. W. 962.

63.—**Laches**.—Vendor's lien does not become stale until 20 years after due.—*Salvo v. Coursey*, Ala., 87 So. 519.

64. **Wills**—Restraint on Marriage.—A husband may rightfully provide for forfeiture of a devise on subsequent marriage of his wife, notwithstanding the general rule that a testator may not impose a total restraint on marriage as a condition of a devise.—*Glass v. Johnson*, Ill., 130 N. E. 473.

65.—**"Surviving Children"**.—Under a will, "I give to my beloved wife all my real estate and personal property of whatsoever nature, kind or effect, * * * and after her death all my real estate and personal property shall be equally divided between my surviving children, each to share and share alike," held, that the words "surviving children" included grandchildren and heirs at law of deceased children, and meant those surviving the testator's death, and not that the funds should be distributed to sons and daughters of testator, who survived death of the widow.—*In re Morris' Estate*, Pa., 113 Atl. 61.

66.—**Testamentary Capacity**.—Where testator directed his trustees to pay annually to his nephew and his sister \$500 if they should be incapacitated, etc., declaring that the trustees may act on their own judgment, but that a certificate of the attending physician should be accepted as proof of the incapacity, the certificate of the attending physician is conclusive; for the word "proof" should be given its technical significance—that is, a deduction from evidence that produces a conviction—and should not be construed as meaning "evidence," which is merely a medium of proof.—*Dupont v. Pelletier*, Me., 113 Atl. 11.

Central Law Journal.

St. Louis, Mo., July 15, 1921.

THE AMERICAN BAR LOSES BOTH ITS LEADERS.

The American bar has two titular leaders, the Chief Justice of the Supreme Court and the President of the American Bar Association. Both of these leaders passed away this year in less than one month of each other.

Hon. Edward Douglass White, Chief Justice of the Supreme Court, died at Washington, May 19, 1921, at the age of 76 years. Hon. William A. Blount, of Pensacola, Fla., President of the American Bar Association, died at Johns Hopkins Hospital, Baltimore, Md., June 15, 1921, at the age of 70 years.

Both of these men were strong and accurate types of the American jurist and lawyer. They both had humble beginnings, both hewed their own ways to the places in the profession for which they were best fitted and both have served their profession with distinction to themselves and honor to the country which they loved so well.

Both of these men were from the South, whence so many of the leaders of the bar in this country have come. But there was no narrow, sectional spirit in either of these great lawyers and the Bar of all sections of the country have been quick to appreciate the loss which the profession sustains in their death and with one voice have declared them worthy of a high place on the honor roll of the American Bar. The closing words of Associate Justice McKenna's tribute to the Chief Justice, delivered from the bench, May 31, 1921, are appropriately repeated in this connection. The learned Justice said:

"This is of the past in barest outline—what of the future? Anticipating it I see no shadow on his fame, no lessening of his example nor of the impression his life and

services have made upon the country. I venture comparisons. I make full concession of the recognized and illustrious merit of those who have preceded him. I make full admission, in assured prophecy, of the abilities of those who will succeed him, yet, considering his qualities and their exercises, I dare to say that, as he has attained he will forever keep a distinct eminence among the Chief Justices of these United States."

Edward Douglass White was born in Lafourche Parish, La., Nov. 3, 1845. His ancestors came from Tennessee, but he was in sentiment and practice, as well as by the accident of birth, a son of Louisiana. He was educated at Georgetown University, Washington, D. C. At sixteen years of age he entered the Confederate army and served until July 6, 1863, when he was captured by Union troops at Port Hudson. In 1868, he entered the law office of Chief Justice Bermudez at New Orleans, and during the same year was admitted to the bar.

Like most lawyers of the South in reconstruction days, Mr. White was, most of the time, to use a common phrase, "up to his ears" in politics. He was elected to the State Senate in 1872. He was appointed an Associate Justice of the Supreme Court of Louisiana in 1876, which position he relinquished in 1879 to resume the practice of law. He managed the successful campaign of Gov. Nicholls, and that achievement easily made him one of the recognized leaders of the Democratic party in Louisiana. In 1888, he was elected to the United States Senate.

When Mr. White became a United States Senator, he became a national figure and was almost instantly recognized as President Cleveland and the friendship that one of the leaders of his party in the Senate. He was an ardent supporter of sprang up between them, as well as the President's recognition of his legal ability, accounted for his appointment to the Supreme Bench Feb. 19, 1894, after the Senate had rejected two successive nominations of New York lawyers.

Justice White's career on the bench is well known to practicing lawyers today. He has been a determining factor in many epochal decisions and has written more important opinions than any other member of the Court except Marshall. His great ability as a judge was recognized by President Taft, who, disregarding party advantage, elevated Justice White to the position of Chief Justice, December 12, 1910. It is said that the solemn and dignified Justice could not restrain his tears as he contemplated such unprecedented recognition of his accomplishments as a judge by one who, by experience and position, was so well competent to pass judgment on his ability.

Next in importance to the formative period of American constitutional law, which Chief Justice Marshall guided with a master hand, was the period of our emergence to a more commanding position in world affairs, which began at the close of the Spanish-American war. Great economic forces were unloosed by that conflict, just as others have been unloosed by the recent world war. Strange ideas were advanced and weird ideals held up which were altogether foreign to any previous American conceptions of right and justice. In addition, there were many necessary changes in governmental machinery to be made, including the commission control of railroads, and the whole range of administrative law which has been rapidly developing.

In the long series of decisions dealing with these question in the last twenty years, Chief Justice White has had a leading part, and amply justified Justice McKenna's tribute heretofore quoted.

Of Mr. Blount, what can we say except that he was a lawyer of extraordinary ability? What more can be said of any practitioner? Although located in a comparatively small city, he displayed his ability as a lawyer so effectively that the profession everywhere came to recognize in him those characteristics and attributes which everywhere combine to make the successful practitioner, namely, a great legal and for-

ensic ability, united with keen business judgment.

But it takes more than legal ability and keen business judgment to make a successful lawyer, in the best sense of that word. He should enjoy a wide acquaintance with polite literature; must have and maintain the highest ideals in his personal and professional life, and should possess a personality that attracts his brethren at the bar, as well as wins verdicts in the courts. Mr. Blount had all these attributes of character and of mind and they drew to him the affections of all lawyers who knew him (and they numbered thousands in all parts of the country), especially those who have been in the habit of attending the meetings of the American Bar Association.

The writer had begun to enjoy a more intimate acquaintance with Mr. Blount as a member of the Conference of Commissioners on Uniform State Laws, in behalf of which movement Mr. Blount labored so arduously and so successfully. Mr. Blount had been the President of the Conference and had contributed generously from his time and energy to bring about the chief purposes of the Conference, to which he was most devoted, namely, the Codification of American Commercial Law. He wished to see the law applicable to business relations stated in clear language, in comprehensive statutes and adopted uniformly by all the states, so that lawyers and business men having to do with the commercial interests of the country might not labor under any uncertainty as to their rights and obligations.

Mr. Blount had other ideals common to the great majority of lawyers, of which a passion for our Constitution and the institutions of our country stood forth most prominently. Although democratic and liberal in his attitude toward needed changes in the law to meet new conditions, he stood like a stone wall against the destructive onslaughts of blind and ignorant demagoguery. In this respect he is a worthy example to be held up to future genera-

tions of lawyers constraining them to stand as the lawyers of all generations have stood for the fundamental rights and liberties of the people.

We could not more appropriately close this eulogy of the two great leaders of the bar, who have just passed from our midst, than to quote from one of the most recent public addresses of the late Chief Justice at the annual dinner of the American Bar Association, Sept. 5, 1919, when he appealed to the lawyers who were coming into the ranks to keep high the banner of professional public service given into their hands by those who have kept it victorious and unsullied in the past. The closing words of this great address were chaste in thought and diction and may well be cherished as a memorial of our beloved Chief Justice. He said:

"I must confess that sometimes, as my thoughts turn to the future and the vast probable increase in our population, to the infinite opportunity which liberty affords to those who misguidedly or with intentional wrong preach the destruction of our institutions under the guise of preserving freedom, a great dread comes to me that possibly some day in the future the forces of evil, of anarchy and of wrong may gather such momentum as to enable them to overthrow directly or indirectly the constitutional institutions which the Fathers gave us and thus deprive us of those blessings which have come from their possession. But this pessimism is also only momentary for, lo! as I strain my vision to the dawn of the generations which are to come my heart rises with exaltation and gratitude because it is given to me to see an advancing force full of love for individual liberty and free government and fixed in the purpose to perpetuate them. Ah! as I look at its noble array, confidence in the future becomes assured and I cannot but exclaim: 'All hail, the American lawyer of the generations which are to follow! Come! Come in your allotted time so that individual liberty may endure, representative government be perpetuated and the only safe and peaceful highway for the advance of democracy in its true sense be made certain!'"

NOTES OF IMPORTANT DECISIONS

FEDERAL ESTATE TAX TAKES PRECEDENCE OVER STATE INHERITANCE TAX.

—The controversy of the federal treasury department and New York officials in respect to the enforcement of the federal estate tax has been settled in favor of the federal act, in the recent case of *New York Trust Co. v. Eisner*, 41 Sup. Ct. 506, wherein the Supreme Court holds that since the federal estate tax imposed by Act Sept. 8, 1916, c. 463, tit. 2, § 201, attaches to the estate before distribution, and is a tax on the right to transmit, or on the transmission at its beginning, it attaches to the whole estate, except so far as the statute sets a limit, and taxes imposed by the states on the right of individual beneficiaries cannot be deducted as charges against the estate allowed by the laws of the jurisdiction, the deduction of which is authorized by section 203.

The plaintiffs in this case also raised the constitutional objection that the estate tax was a direct tax, and therefore beyond the power of the federal government to levy. The Court dismisses this objection by reference to the case of *Knowlton v. Moore*, 178 U. S. 41. Plaintiff's attorney, however, contended that the cases were not parallel, since, in the *Knowlton* case, the tax considered was levied on the right to take a legacy, while the estate tax is levied directly upon the corpus of the estate. To this contention the Court replied:

"It is argued that when the tax is on the privilege of receiving the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton v. Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax: 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.' Upon this point a page of history is worth a volume of logic."

Whether the federal estate tax should be computed on the net value of the estate after the state inheritance tax has been deducted or before, has been a question upon which various state courts have differed. New York has insisted that the state taxes must be paid first. In *re Gihon*, 169 N. Y. 443; In *re Sherman*, 222 N. Y. 540. See also In *re Week's Estate* (Wis.), 172 N. W. 732; Gleason

& *Otis Inheritance Taxation* (2nd Ed.) 66. On the other hand, the majority of the state courts have held that the federal tax should be deducted before computing the state tax. *Harper v. Shaw*, 176 Mass. 190; *People v. North Trust Co. (Ill.)*, 124 N. E. 662; *State v. Corbin (Wash.)*, 181 Pac. 910; *State v. Probate Court*, 139 Minn. 210, 166 N. W. 125; *Re Knight's Estate (Pa.)*, 104 Atl. 765. The Supreme Court adheres to the latter view without, however, binding the states to allow a deduction of the federal tax in computing the state tax. On this point the Court said:

"If the tax attaches to the estate before distribution—if it is a tax on the right to transmit, or on the transmission at its beginning, obviously it attaches to the whole estate except so far as the statute sets a limit. "Charges against the estate" as pointed out by the Court below are only charges that affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries. This reasoning excludes not only the New York succession tax, but those paid to other states, which can stand no better than that paid in New York. What amount New York may take as the basis of taxation and questions of priority between the United States and the State are not open in this case.

FAILURE TO RETREAT NOT CATEGORICAL PROOF OF GUILT IN HOMICIDE CASES.—It is not often that the Supreme Court of the United States discusses questions arising under the administration of the common law of crimes. It is therefore interesting to note the views of this Court on the duty to retreat when attacked before killing the attacking party. *Brown v. United States*, 41 Sup. Ct. 501.

In this case it appeared that deceased had threatened defendant's life. That on the day when the killing took place, deceased quarreled with defendant over the removal of some earth which had just been excavated. Deceased drew a knife and advanced toward defendant, threatening to kill him. Defendant retreated about twenty feet to where his coat was lying on the ground, drew a revolver out of the coat pocket and fired two shots at deceased, from which he died. The homicide was at a place in Texas under the exclusive jurisdiction of the United States. Defendant was indicted for murder by the Federal grand jury, and convicted in the District Court, and the conviction was affirmed by the Court of Appeals (257 Fed. Rep. 46).

The Supreme Court reversed the judgment because of an instruction on the duty to retreat, which, it seems to us, would have been

held sufficient in the majority of state courts. The trial judge instructed the jury among other things that "it is necessary to remember, in considering the question of self defense, that the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm." The instruction was reinforced by the further intimation that unless "retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm," the defendant was not entitled to stand his ground.

Justice Holmes admits that these instructions bring up "with sufficient clearness whether the formula laid down by the Court and often repeated by the ancient law is adequate to the protection of the defendant's rights."

In reaching his conclusion that the common law rule of the duty to retreat is too rigid, Justice Holmes has the following interesting comment to make. The learned Justice said:

"It is useless to go into the developments of the law from the time when a man who had killed another no matter how innocently had to get his pardon, whether of grace or of course. Concrete cases or illustrations stated in the early law in conditions very different from the present like the reference to retreat in *Coke*, Third Inst. 55, and elsewhere, have had a tendency to ossify into specific rules without much regard for reason. Other examples may be found in the law as to trespass ab initio, *Commonwealth v. Rubin*, 165 Mass. 453, 43 N. E. 200, and as to fresh complaint after rape, *Commonwealth v. Cleary*, 172 Mass. 175, 51 N. E. 746. Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self defense. That has been the decision of this Court. *Beard v. United States*, 158 U. S. 550, 559, 15 Sup. Ct. 962, 39 L. Ed. 1086. Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him. *Rowe v. United States*, 164 U. S. 546, 558, 17 Sup. Ct. 172, 41 L. Ed. 547."

"A VINCULO MATRIMONII."

Not long ago, I overheard a woman in conversation with a man, whom I knew. They met after a long interval. The woman seemed quite respectable.

"Since I saw you last," she announced, "I have been married again and divorced again. My last husband was a nice man. I liked him and he treated me right. But he was a traveling man, and that kept him away from home, and I didn't like that. So I divorced him. As long as lawyers will get divorces for one—why not?"

A casual remark, this, to be sure; but rather a sweeping condemnation of the relationship between the legal profession and the divorce evil. If it were only a vague and vagrant spore of feeling engendered by individual experience and floating on a chance wind, it would deserve to be ignored. One has learned, however, from the common currents of popular opinion, such as the press and photo-play, that many people share such a belief. It is a very usual assumption that lawyers hold themselves out to get divorces for money. Grounds and moral considerations are looked upon as unnecessary adjuncts to the end of a *decrée*. One evening, lately, I witnessed a motion picture. In the course of the action, the heroine rather precipitately approached a lawyer on the subject of a divorce. Her counsellor undertook to lecture her and to suggest that she return to the connubial fold. The retort she made mirrors the mind of many on the matter. "I did not come for advice. I came for a divorce." Away with the facts and the law, away with the interest of the State, away with religious scruples. Divorces are for sale—how much the price?

What a travesty of the reality! What a blindness to the truth of things! If one's connection with such problems, warrants conclusions that refute such criticisms, perhaps it is only fair to the public interests and to one's profession to set out those conclusions with candor.

To begin with, it must be remembered that family differences rarely reach the lawyer's office before they have become broils! The last word has been said, the last dish has been thrown—the rupture is beyond repair—before the lawyer is consulted. For the most part the lawyer rushes in where the spouse fears to tread. It is *ex post facto* work for him. To be sure, there are many exceptions. I recollect one instance of a client who came to us to get our approval to contemplated murder. He was armed with a shooting-iron. He had intercepted a code of signals for assignation between his wife and another man. A handkerchief left at a certain mail box meant that he was away from home, et cetera. So he planned to shift the signals and thus inveigle his victim to his house, where he waited to annihilate him. We advised horse-whipping—why stand trial for murder on account of a prostitute? However, the incident passed off. Like all bad men of the blustering kind, he could not achieve courage enough to encompass his own programme.

Usually, the chance to "pour oil on the troubled waters" is denied the lawyer. There is no oil on hand. The best, the most reconciliatory advice, must be indirect. One cannot directly instruct or lecture the mind beside itself with rage, or fixed in cold and bitter anger. Yet deftness will accomplish much. I read to-day a letter written by an old and wise lawyer to an irate woman. She had inquired of him whether he would get her a divorce. In reply, he stated—evidently he had known her well—that he was retired. "But I am not so old and helpless that I cannot represent you if you wish. The trouble with you is that you cannot stay mad with your husband long enough to get a divorce. And think of the children. I suggest to you that you consider well whether you will want to marry again. If not, then give up the idea of a divorce."

There was more, and it was all sage and sensible. It indicated to her that she was only in a passing tempest, and that she

would do well to let Time clear the air and smooth the waters—yet he did not question the justice of her complaint. Had he done so, she would have scoffed at his advice and hastened other-whither. Aye, and fared worse, for he did much to restore the sway of reason.

Libel to the contrary, lawyers do a great deal to discourage divorce. Not those lawyers, however, who, in an excess of virtuous self-esteem, proclaim a rule not to participate in divorce cases. One very good friend of ours prints on his letter head, "No employment desired in criminal cases, or divorce cases." These men are ostentatiously shirking their duty. The law authorizes divorces for certain causes. Lawyers administer the law. The field of the law is as broad as life itself. To fence off one portion of the field and refuse to do one's share toward weeding out of it the tares of disrepute is to stand in the sandals of the Man with One Talent. If unworthy things are done in the conduct of divorce litigation, the self-respecting practitioner can, by taking his part in the fray, see that the rules are observed and the best principles of justice vindicated. Whether or not he be successful in this, he is a sworn minister of the law, and it approximates contempt in him to refuse service where the law commands it. Such an attitude is very similar to, and quite as reprehensible as, that exhibited by another friend of ours, who attaches to his card in a law directory the warning: "Collections under \$1000 not solicited," forgetting that the chief reward of the profession is the opportunity to do charity.

No, we need a draft law to subject some of the purple purists of our guild to the burdens that the rank and file of us bear. But, even left to ourselves, the rest of us strive to exalt our mistress to the limit of our puny strength. The sum of our efforts with reference to the divorce problem is distinctly an alleviation of the evil.

When the family trouble has passed the stage of cure through the medicines of sympathy and forgiveness and has poisoned

the body of the family so as to require surgical treatment—then we are called in. And we find a curious condition of things.

For one thing, we learn that something like eighty per cent of the divorce cases are consent affairs. This, of course, includes in the definition of "consent" examples of mere utter indifference. The trial judges sense this. The lawyers know it. Compare the number of "fought" divorces with the number of those uncontested. It is comparatively seldom that the parties tilt the issue out in court. When they do, heaven forbid the lawyers engaged. The parties are so acrimonious, the evidence is so disputatious and sometimes so revolting, that the lawyer promptly forswears marriage, for now and for the life to come.

Customarily, on the other hand, the battle is over before the legal proceedings have begun. The parties have "agreed to disagree" permanently. In such a case, so incessantly recurring, it is for the lawyer to diagnose the situation. Having sized the matter up, he can pretty well tell whether there is hope of a reconsideration. Oftentimes, his investigation is *ex parte*; but quite frequently, both parties appear and detail and retail their difficulties. At this point, the essential thing is not to study the facts from the point of view of their adequacy as a basis for divorce; but rather to develop the possibilities for the future in case the present fracas is adjusted. Once convinced that, regardless of the consequences, the cohabitation is forever ended or vice-versa, the lawyer can proceed to examine the complaint in its legal bearings. In the event he has concluded that no divorce is necessary, he can often bring about peace by rejecting the case made as insufficient in law. On the contrary, should he adjudge the severance complete—and should no especial equities intervene—he can afford to be relatively indifferent to the case-made. He is, in this latter instance, "making the best of a bad business." These people are done with each other. Then, certainly, it will subserve the State's interests better to regular-

ize their status. Under these circumstances, there is a pitiful revamping of aged slights and ill-treatment. Some of the bills that are drawn, and in the absence of opposition, "stick" are almost laughable. Simmered down, and with the verbiage boiled out of them, they amount after all to a rehash of ancient and half-forgotten tiffs united with some single recent occurrence that brought about the present crisis. Yet they serve their purpose. No defense is made. Quite possibly, in a round-about way, the respondent pays the costs of court and the fee of complainant's lawyer. The decree issues. If there is anything improper in the proceedings the bench shares the opprobrium thereof with the bar, for the bill and the evidence goes through the court's hands. None of those wise and human jurists—and, believe me, the *nisi prius* wool-sack is adorned by a fine body of men—is deceived. They know the insides of these matters. They can read the truth, the whole truth and nothing but the truth from between the lines of the papers. They see the "other man" peering round the corner with hands outstretched to the emancipated "injured" one. They understand the disappointment that comes when one, who has married for wordly possessions, learns, in disillusionment, that poverty is to be her, or his, portion. They appreciate that trouble-breeding condition that arises when the "old man" marries again and brings in a new and young wife to occupy the home and divide the inheritance with adult offspring of a former union. These factors are the roots of the divorce evil. They do not appear in the language of the records; but one can hold the parchment to the light and they will become visible as water-marks stamping the whole character of the case. In the outcome of divorce suits, the State is interested. The Judges are the conservators of the State's interest. But though they see the collusion, and know the insubstantiality of the case made, they have also to recognize that, ultimately, in personal affairs such as these, the event is in the hands of the par-

ties. If *they* will not keep their marriage vows, the court's coercion cannot avail. Refuse these slackers freedom, and immorality will increase. Thus, rebelling against the inevitable, the Judges must continue to cut the gordian knot of marriage, on the most trivial evidence, where both parties invite the sword of separation. Naturally, collusion is frowned upon, and, when the evidence thereof appears, blasted with the fire of condemnation. Yet the court rolls mutely attest its prevalence in the huge proportion of undefended divorce suits. A circuit judge of our acquaintance, appointed about a year ago, states that he has signed divorce decrees at a rate of one every other day since taking office. His circuit is a small one, thinly populated.

Where a contest is waged, and especially where the interest of minor children is involved, or a property settlement is necessitated, the Judge becomes far more than a lay figure. Now, indeed, the procedure becomes solemn and the case real. In such circumstances it is that that judge, whom we personally most love and admire, shines forth best of all as a Judge of supreme merit. The case is practically taken from the lawyer's hands. Incessant consultations occur. First one of the parties and then the other is summoned alone to the judge's chambers. At last, the lawyers sitting ineffectively by, are informed of the result. A reconciliation or a compromise has been accomplished. The instructions are imperative. "Draw an order to that effect." Marvelous the achievements of this man over the recalcitrant and even the incorrigible! Many a home has him to bless. He sees in his office the power and privilege to do equity—and he does it with a strong arm and a compelling spirit of service.

As the stories of matrimonial tribulation come to us—and they come, of course, continually, many more in number than ever eventuate in litigation—the causes are, by and large, easy to classify. The tap-root cause of all is mere bad sportsmanship. These people have not really meant that

vow that forsaking all others they will cleave to this one woman, or man, till death shall part the twain. They made their bargain—hastily often, improvidently many times—but they made it. And now they repent it, and wish to retract it. They are not willing to play the game through. All that wonderful promise, exquisitely phrased, beautifully meaningful, to sustain and cherish in joy and in sorrow, in health and sickness, in prosperity and adversity, and to be faithful accordingly, was for them essentially sound without sense. A few lapses into drunkenness, a few brutal speeches, a decline of fortunes—and the breach is made.

Many, many marriages are motivated, apparently, by property considerations. The divorces, like the marriages, are likely to be actuated by a similar motive to that bringing about the marriage, viz: an arbitration of property squabbles. Near here is a town settled under a development scheme where many of the residents are old soldiers. Numbers of these old men have married younger women. Practically all the veterans are septuagenarians. Domestic troubles have, in natural course, ensued. In these cases the property feature is often predominant. The struggle was not to retain the bond of affection but to force a property adjustment or to maintain a grip on a miserable little pension. *

The triangle is another prolific cause for divorce. One or the other spouse has become infatuated elsewhere. We know of one instance where a married man fell in love with another man's wife. In order to legalize the tangle, both couples had to be divorced and the new one formed. Yet it was a case of necessity. Failure to rectify it would undoubtedly have bred illicit relationship. Time and again, indications show that the husband-to-be finances the case of the wife against the husband that is. Sometimes, the impropriety of the triangle existence is not so obvious. Husband or wife left the domicile years and years ago. Nothing was done. Now

death or a new adventure impends and the aid of the law is sought.

Quite often the cause is simple non support. This is no *ground* in Florida—I differentiate "ground" from "cause"—but it is the kernel of the thing, nevertheless, the "milk in the cocoanut." After a long period of neglect, coupled perhaps with absence, the patience of the injured spouse breaks and she seeks relief.

Many times, too, intrusive relatives, in-laws or step-somethings, jangle the keys out of harmony. *Her* son or *his* mother created the situation—constantly this is demonstrated in the instances that come under our observation.

These are some of the chief causes. They are not "grounds"—any of them. Property disputes, officious relatives by marriage, non-support, incompatibility, even the "eternal triangle," unassociated with vice, are not accepted, at least in this State, as "grounds" for divorce. Indubitably they are the causes, the mainsprings, the prompters, of the great majority of divorces sought. In order to win the end desired, they camouflage themselves in a dress of grounds that often presents a bizarre and grotesque pattern to the eye. Under the disguise, that same shrewd eye can usually discern the true cause.

The point is, however, that to the lawyer or the judge, causes and grounds are secondary. Lawyers and judges, in these divorces problems, deal largely in "*faits accomplis*." It happened to us the other day, that a client consulted us about his family difficulties. At length, and in the usual irrelevant way, he discoursed on the faults of his wife and his own virtues. Should he get a divorce? We advised against it. The case made was very frail. "She just neglects me, and I won't stand it." The woman seemed mercenary, it would be simpler to threaten her with desertion by will. He got up to go. "Well you see, I put her trunk and things out in the yard this morning and told her to go and never come back. So I thought I had better ask

you what to do." Obviously, this put a fresh complexion on the matter. What chance was there now of negotiating a peace? He had put himself beyond help.

The real burden of this essay is to pass the responsibility for the existence of the divorce evil back to the parties to the litigation. So far as the services of a reputable lawyer are engaged, it is to assuage this social sore. Admittedly there are shy-sters, there are men who bid for this business, foster it and encourage it. But no respectable lawyer abets these disagreements. Sometimes such a lawyer may, in the interest of public morals, sign his name to a flimsy bill. He sees beyond the formal averments. Sometimes a judge may grant a decree in an *ex parte* case that he would not suffer in a disputed matter. In divorce cases, there are parties not of record to be thought of—children, the State. Be it remembered that, to an astonishingly large section of the public, divorce is a luxury. Such people—negroes are especially fallible in this regard—will accomplish their ends anyhow. They are unmoral. That they come asking for a divorce bespeaks at least aspirations toward morality.

Reverting now to the citation given at the beginning of this article. The woman in question may have been right in this, that the lawyer she employed did not search out the truth with sufficient rigor. One thing, however, is sure. No lawyer drew a bill for her, no judge granted a decree for her, on the facts as she told them to her confidant. She had to perjure herself to get her freedom, and it is safe to say that she did not trust her lawyer with the truth. So the sin and the obloquy are wholly hers.

Can lawyers do more than they are doing to abate the nuisance? They can. They can make of the proceedings for divorce a much more "real" process. They can avoid the appearance of casualness or formality. They can name and maintain fees sufficient to deter splenetic excursions into such litigation. They can test more thoroughly the conscience of their client by examining

into, and exposing to the eye of that conscience, the real and remediable errors of prejudice and jealousy and selfishness that jaundice the disposition of the complainant.

They can do more of these sorts of things and do them better. Make no mistake, however. They are already laboring in this field. And all that they can do will never go very far to bring about a state of blessedness for everybody, without more.

Marriage must be a more serious obligation in its inception before the divorce evil is cured. Children must learn to keep their vows and to face life bravely and to do their part regardless of the derelictions of others, before we advance very far. This brings us back to the schools and the churches and the home. To these three institutions we must look for regeneration.

GEORGE PALMER GARRETT.

Kissimmee, Fla.

MASTER AND SERVANT—INJURY BY CO-EMPLOYEE.

HINCHUK v. SWIFT & CO.

Supreme Court of Minnesota. April 22, 1921.

182 N. W. 622.

An employee injured during the course of his employment, though by the willful act of a co-employee, is within the Compensation Act (Gen. St. 1913, §§ 8203, 8230), if there is some causal relation between the employment and the injury, that is if the injury be one which may be seen to have had its origin in the nature of the employment. An injury inflicted by a co-employee as a result of a quarrel over the manner of doing their work is within the rule.

HALLAM, J. This case arises under the Workmen's Compensation Act. Alex Bush was in the employ of defendant at its packing plant at South Saint Paul. He and a workman named Harper were engaged in trucking meat to a washing machine. When the truck reached the machine it was unloaded piece by piece. Two men worked together on a truck. One would pull and the other would push and the fair way was to take turns. Bush and Harper quarreled over the moving of the truck, each claimed he was being compelled to do more than his share. The testimony is somewhat in conflict, but one witness testi-

fled that they quarreled over who should push and who should pull the truck. Finally Bush took the handles and pulled and Harper pushed. When they reached the washing machine they quarreled some more, each calling the other names. When they finished the argument Bush started to work unloading meat, but Harper walked 12 or 15 steps away, picked up a piece of iron pipe that lay there and struck Bush over the head and caused his death. The trial court allowed compensation under the statute.

The statute is that compensation shall be paid by the employer, "in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of his employment." G. S. 1913, § 8203. The word "accident" is defined to mean "an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time, injury to the physical structure of the body." G. S. 1913, § 8230 (h). The act is declared not to "include an injury caused by * * * a third person or fellow employee * * * because of reasons personal to him, and not directed against him as an employee, or because of his employment." G. S. 1913, § 8230 (i).

Section 8230 (h) gives us no trouble. Section 8203 and section 8230 (i) taken together may clearly include an injury inflicted by the willful act of another. See *State ex rel. Anseth v. District Court*, 134 Minn. 16, 158 N. W. 713, L. R. A. 1916F, 957; *State ex rel. Johnson Sash & Door Co. v. District Court*, 140 Minn. 75, 167 N. W. 283, L. R. A. 1918 E, 502. This is the prevailing construction of similar statutes as applied to cases similar to this.

In *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill. 31, 120 N. E. 530, two employees in culling barrel staves became involved in a dispute because one took staves from the rack of the other. One injured the other. Compensation was allowed.

In *Swift & Co. v. Industrial Commission*, 287 Ill. 564, 122 N. E. 796, an employee whose duty it was to repair leaks in steam pipes in a large packing plant was injured in a fight with the foreman of a department to which he had been summoned, the altercation growing out of matters connected with the injured employee's work. The statute was held to apply.

In *Matter of Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344, claimant, employed as a driver by a brewing company took exception to the manner in which a fellow workman washed off the horses. A quar-

rel ensued and in physical encounter that grew out of it, claimant was injured. Held, entitled to compensation.

In *Polar Ice & Fuel Co. v. Mulray* (Ind. App.), 119 N. E. 149, an employee of an ice company, employed to check and collect for shortage of drivers, was shot and killed by a driver as a result of a quarrel over collections. Compensation was allowed.

In *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, a worker on a railroad section was told by the foreman to drop his shovel and get his time, but the man refused and the foreman undertook to take his shovel from him and was injured. Compensation was allowed.

In *McIntyre v. A. Rodgers & Co.*, 41 Scottish Law Reporter, 107, two workmen engaged in a tussle over the possession of a brush to be used in the work and one was injured. The statute was held to apply.

The principle applicable to such cases is that the injury is included within the statute if there is some causal relation between the employment and the injury. Not that the injury must be one which ought to have been foreseen, but it must be one which, after the event, may be seen to have had its origin in the nature of the employment.

This is such a case. Bush and Harper became involved in a quarrel over the manner of doing the work in which they were jointly engaged. There was no personal antipathy. Differences over the work caused the whole trouble. The trial court evidently took the view that there was no real cessation of hostilities from the time trouble started until it was over. We think the evidence sustains this position and that the court properly held the case to be within the statute.

Affirmed.

NOTE.—Injury by Willful Act of Co-Employee as Compensable.—An injury resulting from an assault by a workman upon a fellow workman while the latter is engaged in the work of the employer is an accidental personal injury arising out of and in the course of the employment. *Stasmas v. State Industrial Com'n, Okla.*, 195 Pac. 762.

The above rule is not applicable, however, where the injured workman provoked the assault. Thus, where a factory oiler, upon being told that he was using too much oil, called his foreman a liar, and the foreman struck him, it was held that the oiler was neither injured in nor by his employment, and hence was not entitled to compensation. *Knocks v. Metal Package Corp.*, 185 N. Y. Supp. 309.

Where an employee engaged in unloading a freight car refused to get a drink for a negro workman when he was getting one for himself,

and the negro threatened to knock him in the head if he climbed on the car, which threat was carried out to the fatal injury of the employee, it was held that the injury did not have its origin in the employment, and that compensation was not recoverable. *Chicago v. Industrial Com'n, Ill.*, 127 N. E. 49.

Where a miner was killed by a car driver, both employes of the same employer, in a quarrel about the non-delivery to him the night before of an empty truck, he being the aggressor, it was held that his death was not the result of an accident "arising in the course of the employment," and that there was no causal connection between the employment and the killing. *Marion County Coal Co. v. Industrial Com'n, Ill.*, 127 N. E. 84.

An employee while engaged at his work was struck in the eye by an apple thrown by a fellow servant in horseplay. Held, that the injury was one arising out of and in the course of his employment. *Leonbruno v. Champlain Silk Mills, N. Y.*, 128 N. E. 711.

Where an employee was killed by a fellow workman in a fight provoked by deceased and another, his injury did not arise out of the employment. *Romerez v. Swift & Co., Kan.*, 189 Pac. 923.

An abattoir worker was struck by a piece of flesh, resented the assault, and struck another employee with the flesh, believing him to be the assailant, and the latter in turn kicked the claimant. Held, that claimant's injury arose out of and in the course of his employment. *Verschleiser v. Joseph Stern Son, N. Y.*, 128 N. E. 126.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE AMERICAN BAR ASSOCIATION.

The annual meeting of the American Bar Association will be held in Cincinnati, Ohio, Aug 30, 1921, to Sept. 2, 1921.

All meetings of the Association except on Wednesday evening will be held in the ball room at the Hotel Sinton. The Wednesday evening meeting will be held in Convention Hall, Hotel Gibson.

The Executive Committee will meet on Tuesday, August 30, at 8:30 p. m., in Parlor F (Mezzanine Floor), Hotel Sinton.

The General Council will meet in the Parlor F (Mezzanine Floor), Hotel Sinton. The first meeting of the General Council will be held on Wednesday, August 31, at 9:00 a. m.

The offices of the Secretary and Treasurer will be located in the Hotel Sinton Tea Room (Main Floor), and will open for registration of members and delegates and for the sale of dinner tickets on Monday morning, August 29, at 10:00 o'clock.

BUSINESS PROGRAM OF THE ASSOCIATION.

Wednesday Morning, August 31, at 10 O'clock.

Ball Room (Main Floor) Hotel Sinton.

Addresses of welcome on behalf of Ohio State Bar Association: Harry J. Davis, Governor of Ohio, and John Galvin, Mayor of Cincinnati.

Announcements.

Report of the Secretary.

Report of the Treasurer.

Report of the Executive Committee.

Nomination and Election of Members.

The President's Address.

Address by Sir John Simon, of London, England, former Attorney General and Secretary of State for Home Affairs.

State delegations will meet in the Ball Room (Main Floor) Hotel Sinton at the CLOSE of this session to nominate members of the General Council, and to select nominees for Vice-President and Local Council for each State.

Wednesday Afternoon, August 31, 2:00 O'clock.

Ball Room (Main Floor) Hotel Sinton.

2:00 p. m. Annual Business Meeting of Ohio State Bar Association.

4:00 p. m. Joint Session of American Bar Association and Ohio State Bar Association. Address by Harry M. Daugherty, Attorney-General of the United States.

Wednesday Evening, August 31, at 8:00 O'clock

Convention Hall, Hotel Gibson.

Address: "Our Brethren Overseas," John W. Davis, of New York, former Ambassador to Great Britain.

Presentation of Memorial Minute upon the late Chief Justice of the United States.

Election of the General Council.

9:30 p. m. Reception in the Ball Room (Main Floor) Hotel Sinton.

Thursday Morning, September 1, at 10 O'clock.

Ball Room (Main Floor) Hotel Sinton.

Reports of Sections and Committees. The names of Chairmen are given below.

The consideration of the Reports will begin promptly at 10:05 o'clock.

SECTIONS.

10:05 a. m. Comparative Law. Robert P. Shick.

10:10 a. m. Judicial Section. Charles A. Woods.

10:20 a. m. Legal Education. Elihu Root.

10:30 a. m. Patent, Trade-Mark and Copyright Law. A. C. Paul.

10:40 a. m. Public Utility Law. Bentley W. Warren.

10:50 a. m. National Conference of Commissioners on Uniform State Laws. Henry Stockbridge.

11:00 a. m. Conference of Bar Association Delegation. Stiles W. Burr.

COMMITTEES.

11:10 a. m. Professional Ethics and Grievances. Edward A. Harriman.

11:20 a. m. Commerce, Trade and Commercial Law. Francis B. James.

11:40 a. m. International Law. Charles Noble Gregory.

11:50 a. m. Insurance Law. Arthur I. Vorys.

12:00 m. Publicity. Martin Conboy.

12:10 p. m. Memorials W. Thomas Kemp.

12:15 p. m. Jurisprudence and Law Reform. Everett P. Wheeler.

1:00 p. m. *Adjournment*.

2:30 p. m. Excursion (to be announced later).

Thursday Evening, September 1, at 8 O'clock.

Ball Room (Main Floor) Hotel Sinton.

Address: "Without a Friend," Charles S. Thomas, of Colorado, former United States Senator.

Reports of Committees. The names of Chairmen are given below.

9:15 p. m. Admiralty and Maritime Law. Robert M. Hughes.

9:25 p. m. Noteworthy Changes in Statute Law. Thomas I. Parkinson.

9:35 p. m. Drafting of Legislation. William Draper Lewis.

9:40 p. m. Uniform Judicial Procedure. Thomas Wall Shelton.

9:50 p. m. *Adjournment*.

Friday Morning, September 2, at 10 O'clock.

Ball Room (Main Floor) Hotel Sinton.

A Symposium on the general subject, "The Administration of Criminal Justice," under three sub-topics, as follows:

10:05 a. m. "Unenforceable Law," by Raymond B. Fosdick, of New York.

10:30 a. m. "The Illegal Enforcement of Criminal Law," by Luther Z. Rosser, of Georgia.

10:55 a. m. "The Adjustment of Penalties," by Marcus A. Kavanaugh, of Illinois.

11:25 a. m. General Discussion by Association.

12:45 p. m. Nomination and Election of Officers. *Adjournment* at 1:00 o'clock.

Friday Afternoon, September 2, at 2:30 O'clock.

Reports of Committees. The names of Chairmen are given below.

2:35 p. m. Membership. Frederick E. Wadhams.

2:45 p. m. Change of Date of Presidential Inauguration. William L. Putnam.

3:00 p. m. Classification and Restatement of Law. James D. Andrews.

3:15 p. m. Legal Aid Work. Reginald Heber Smith.

3:30 p. m. Aviation. Charles A. Boston. Miscellaneous Business. *Adjournment sine die*.

Friday Evening, September 2.

Annual Dinner at 7:00 p. m. Dinner to Ladies at 7:00 p. m.

Saturday, September 3.

All day *Excursion* to Dayton, Ohio.

Hotel Accommodations.

(All hotels European plan, except as stated. Prices named are per day.)

Hotel Gibson, 4th and Walnut, single room and bath, \$2.50 up; double room and bath, \$4.25 up.

Hotel Sinton, 4th and Vine, single room and bath, \$3.50 up; double room and bath, \$5.50 up.

Havlin Hotel, Vine & Opera Pl., single room and bath, \$3.00 up; double room and bath, \$5.00 up.

Hotel Metropole, 6th and Walnut, single room and bath, \$2.50 up; double room and bath, \$4.50 up.

Grand Hotel, 4th and Central, single room and bath, \$2.50 up; double room and bath, \$4.00 up.

Palace Hotel, 6th and Vine, single room and bath, \$2.00 up; double room and bath, \$3.00 up.

Emery Hotel, 421 Vine, single room and bath, \$2.50; double room and bath, \$4.50.

Hotel Alms, McMillan and Alms Pl., (American plan), single room and bath, \$4.00; double room and bath, \$7.00.

Mr. Ben B. Nelson, Fourth National Bank Building, Cincinnati, Ohio, has charge of reservations for members and guests. In writing to Mr. Nelson please state:

a. Preference of hotels; b. time of arrival; c. period for which rooms are desired; d. whether single or double room desired; e. how many persons will occupy each room.

Members who wish to do so are at liberty to make direct arrangements with hotel preferred.

Make your reservations early. Notify Mr. Nelson promptly of any cancellations.

Railroad Fare.

Arrangements have been made with the railroads whereby members of the American Bar Association and dependent members of their families who attend the annual meeting will have the benefit of a fare and one-half. They will pay *full fare going to Cincinnati*, and, up on purchasing railroad ticket, will ask for a certificate, which will be vised by the Secretary at Cincinnati, thus entitling the holder to *half fare on the return trip*. Further details of the plan are given in the following statement furnished by an official of the Central Passenger Association. The dates for ticket sales will, of course, vary in the different Passenger Association territories:

The following directions are submitted for your guidance:

1. Tickets at the regular one-way tariff fare for the going journey may be obtained on any of the following dates (but not on any other date): Aug. 23-24 and Aug. 27-Sept. 2, 1921. Be sure that, when purchasing your going ticket, you request a *CERTIFICATE*. Do not make the mistake of asking for a "receipt."

2. Present yourself at the railroad station for ticket and certificate at least thirty minutes before departure of train on which you will begin your journey.

3. *Certificates are not kept at all stations.* If you inquire at your home station, you can ascertain whether certificates and through tickets can be obtained to place of meeting. If not obtainable at your home station, the agent will inform you at what station they can be obtained. You can in such case purchase a local ticket to the station which has certificates in stock, where you can purchase a through ticket and at the same time ask for and obtain a certificate to the place of meeting.

4. Immediately upon your arrival at the meeting present your certificate to the endorsing officer, Mr. W. Thomas Kemp, as the reduced fare for the return journey will not apply unless you are properly identified as provided for by the certificate.

COMMISSIONERS ON UNIFORM STATE LAWS.

Program of Thirty-First Annual Conference, at Cincinnati.

The thirty-first annual meeting of the National Conference of Commissioners on Uniform State Laws will be held in Cincinnati, Ohio, August 24 to 30, 1921, at the Hotel Gibson (Convention Hall), just preceding the meeting of the American Bar Association.

Following is the TENTATIVE PROGRAM:

Wednesday, August 24.

10:00 a. m. Meeting of the Executive Committee.

2:00 p. m. FIRST SESSION.

Address of Welcome.

Response of the President.

Roll Call.

Reading of the Minutes of the Last Meeting.

Report of the Secretary.

Report of the Treasurer.

Report of the Executive Committee.

Appointment of Nominating Committee.

Appointment of Auditing Committee.

8:00 p. m. SECOND SESSION.

Reports of Standing Committees:

Scope and Program Committee.

Publicity Committee.

Legislative Committee.

Committee on Appointment of and Attendance by Commissioners.

Presentation and consideration of the reports of the following special committees: not presenting drafts of Acts:

Insurance.

Prohibition.

Drug Law.

Securing Compulsory Attendance of Non-Resident Witnesses in Civil and Criminal Cases.

Automobile Legislation.

One Day's Rest in Seven.

Depositions and Proof of Statutes.

Tribunal to Settle Industrial Disputes.

Co-operation with the American Judicature Society.

Co-operation with the American Institute of Criminal Law and Criminology.

Uniformity of Judicial Decisions.

Occupational Diseases.

Registration of Title to Land.

Primary Law for Federal Officers.

Marriage and Divorce.

Report of Nominating Committee.

Election of Officers.

Thursday, August 25.

9:30 a. m. THIRD SESSION.

Consideration of Eighth Tentative Draft of a Uniform Incorporation Act.

2:00 p. m. FOURTH SESSION.

Consideration of Eighth Tentative Draft of a Uniform Incorporation Act.

8:00 p. m. FIFTH SESSION.

Consideration of Eighth Draft of a Uniform Incorporation Act.

Report of Commercial Law Committee on amendments to the Warehouse Receipts and Bills of Lading Acts.

Report of Commercial Law Committee on a Blue Sky Law.

Friday, August 26.

9:30 a. m. SIXTH SESSION.

Consideration of First Tentative Draft of a Uniform Fiduciaries Act.

2:00 p. m. SEVENTH SESSION.

Consideration of First Tentative Draft of a Uniform Fiduciaries Act.

8:00 p. m. EIGHTH SESSION.

Consideration of First Tentative Draft of an Act relating to the Status and Protection of Illegitimate Children.

Saturday, August 27.

9:30 a. m. NINTH SESSION.

Consideration of Second Tentative Draft of a Uniform Declaratory Judgments Act.

2:00 p. m. TENTH SESSION.

Consideration of Second Tentative Draft of a Uniform Declaratory Judgments Act.

(At 4:30 p. m., the Conference adjourns for local entertainment.)

Monday, August 29.

9:30 a. m. ELEVENTH SESSION.

Consideration of First Tentative Draft of a Uniform Mortgage Act.

2:00 p. m. TWELFTH SESSION.

Consideration of First Tentative Draft of a Uniform Aviation Act.

Consideration of Report of the Committee on Compacts Between States.

Tuesday, August 30.

Unfinished business.

tunity to view at close range the working of the English Rules of Procedure, of which so much has been written the last few years. The result of these investigations will be printed in the Journal as soon as Mr. Shelton is able to put them into shape for publication. —EDITOR.]

HUMOR OF THE LAW.

Personal.—I am looking for my wife, Mrs. George Schomberger, nee Agnes Schomberger, who left my bed and board on October 26th, taking with her my 2300 dollars. I should like to get in touch either with her or those who know her whereabouts so that I can send her a special sum of 100 dollars so that she can get even further away.

—*The Docket.*

CORRESPONDENCE.

A LETTER FROM OUR ASSOCIATE EDITOR.

London, June 26, 1921.

Editor, CENTRAL LAW JOURNAL:

Dear Robbins:

There is little else these Englishmen could have done for me. My visit ends, officially, Tuesday at 1:30, with the House of Lords. Monday I sat with the Court of Appeals in the morning, and with the Commercial Court in the afternoon.

It has been one steady movement on a fixed schedule all day long, and a steady making of notes at night when not dining. I have been the guest of Lords Bryce, Haldane and Cave, and Sir John Simon. I was also the guest of Sir Thomas Miller Chitty, the grandson of the great law writer of that name. He is the head of English procedural reform. I have dined twice with him and sat with him all day in court.

Yesterday afternoon, I called on the Law Editors and found them most attractive. Of these more will be said later.

It is very cold here and there is no coal. I am glad to be returning at noon on Wednesday, after working day and night for sixteen days. Eight more days will be used in summarizing my observations. I hope to have a few articles ready shortly after my return.

Yours sincerely,

THOMAS W. SHELTON.

[We thought our readers would be interested in this letter, written hurriedly from London by our Associate Editor, Mr. Thomas W. Shelton, of Norfolk, Va. Mr. Shelton has many friends among the members of the Bar who will be delighted to learn that his trip has been so successful with respect to the purpose Mr. Shelton had in mind, namely, the oppor-

When a lady who was "burning up the road" on the boulevard was overtaken by a traffic officer and motioned to stop, she indignantly asked:

"What do you want with me?"

"You were running 40 miles an hour," answered the officer.

"Forty miles an hour? Why, officer, I haven't been out an hour," said the lady.

"Go ahead," said the officer. "That is a new one on me."—*Pittsburg Dispatch.*

A BUSH VISITOR.

For the host no matter—
For the guest the best,
One knife, one fork,
One cup, one platter,
Dampener and mutton—
All that you need.
"Cut in and cut on,
Have a good feed!"
No time to wipe
Platter and cup—
"Fill up your pipe;
The dog washes up."
Pipes drawing well,
Yarns turn-about—
Bush-fires and floods
Sheep dogs and drought.

The fire burns low.
Snakes, how they snore—
Guest on the bunk,
Host on the floor.

—*Sydney Bulletin.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Adverse Possession**—Cemeteries.—While the right which one acquires in a cemetery lot is rather in the nature of a perpetual easement subject to be controlled by the state in the exercise of its police power, it is such a valuable right as a court of equity will protect, and the same character of adverse possession that will confer title to real estate will suffice to confer such right.—*Sherrard v. Henry*, W. Va., 106 S. E. 705.

2. **Animals**—Tick Eradication Statute.—The Tick Eradication Statute, in its application to Coryell county, embraced within the quarantine zone, held not obnoxious to the Constitution, and not violative of the rights of cattle owners in the county, personal or property, because their cattle were free from statutory diseases or fever-carrying tick.—*Lewis v. Harrison*, Tex., 229 S. W. 691.

3. **Attorney and Client**—Compensation.—Where an attorney was employed to collect a note of a non-resident, and attorney placed the notes with corresponding attorneys who secured an agreement with debtor and beneficiaries of insurance policy of debtor that, if no collection was attempted during lifetime of debtor, insurance policy would stand as security, attorney was not estopped to sue for his services against executrix of client because he had sued out vexatious suits against the same defendant and the insurance company in foreign state.—*Hornish v. McConnell*, Iowa, 182 N. W. 406.

4. **Compromise with Client**—In an action against defendant to recover one-third of amount paid by defendant to client by attorneys, who had been assigned a one-third interest in a cause of action against defendant in order to secure their services, it was not necessary to plead and prove all the facts which would have been necessary in the original action to entitle their client to recover.—*Wichita Falls Electric Co. v. Chancellor & Byran*, Tex., 229 S. W. 648.

5. **Confidential Relations**—The rule of equity in respect of confidential relations between attorney and client is founded, not on the professional relation per se, but on the influence which that relation implies, and will therefore operate as long as the influence exists, although the attorney may not be then acting as attorney.—*Jones v. Caraway*, Ala., 87 So. 820.

6. **Bankruptcy**—Adverse Claimant.—An assignee for the benefit of creditors, who turned over to a trustee in bankruptcy the property of the bankrupt in his possession, retaining only an amount claimed by him for fees and disbursements, was an "adverse claimant" of the moneys retained, and could not be proceeded against summarily in the bankruptcy court,

over his protest duly made, but was entitled to have his claim determined in a judicial proceeding suitable to that purpose.—*Galbraith v. Valley*, U. S. S. C., 41 Sup. Ct. 415.

7. **Banks and Banking**—President's Draft.—Merely because a bank's draft is issued by its president in payment of his individual debt, the creditor is not as matter of law charged with duty of inquiry as to whether it had been paid for, though the president's power to issue drafts, whether in payment of his own debts or to another, is conditioned on the bank's being paid therefor; the presumption of honesty being indulged.—*Fort Worth Nat. Bank v. Harwood*, Tex., 229 S. W. 486.

8. **Bills and Notes**—Bona Fide Holder.—The words, "For value received we hereby assign, transfer, and set over to the M. Bank all our rights, title, and interest in and to the within note and in and to the said * * * trucks for which this note was executed," written on the back of a promissory note and signed by the payee, was a sufficient indorsement to give the transferee the rights of a bona fide holder.—*Benton Transfer Co. v. Marion Nat. Bank*, Ga., 106 S. E. 735.

9. **Insanity of Maker**—Payee, accepting note to secure husband's debt and deed of trust on wife's land to secure note without knowledge that wife at time of execution of deed of trust was insane, was not protected as an innocent purchaser.—*White v. Holland*, Tex., 229 S. W. 611.

10. **Terms of Contract**—In an action by an indorsee of promissory notes given for the purchase price of a farm tractor, where the answer and cross petition set up failure of consideration because of a breach of warranty in the contract of sale and alleged that plaintiff was not a holder in due course, held, that it was error to instruct that, if the plaintiff purchased the notes with knowledge of the terms and conditions of the contract under which the tractor was sold, the judgment should be for the defendant.—*Advance Rumely Thresher Co. v. West*, Kan., 196 Pac. 1061.

11. **Brokers**—Authority.—A writing addressed to an agent containing the following: "I shall be glad if you could sell the property, I would be glad for you if you could sell the property and get the commission. Tell your man to make me an offer"—stating the rate of commission on the dollar to be paid in the event of a sale being consummated, and signed by the owner, is sufficient to satisfy the statute of frauds, P. L. 1911, p. 703 (Comp. Stats. N. J. 1st Supp., p. 747). It is an authority for selling the property described in the writing.—*Clark v. Griffin*, N. J., 113 Atl. 231.

12. **Carriers of Goods**—Delay.—Loss for consequential damage which shipper suffered of the whole of the value of potatoes by reason of his loss of the sale of them which he had made at a stipulated price, caused by negligent delay in the transportation, followed by the subsequent conversion of the goods by the wrongful sale of them by the terminal carrier, was within the operation of the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa), which makes the initial carrier liable for any loss, damage, or injury to such property, etc.—*New York, P. & N. R. Co. v. Chandler*, Va., 106 S. E. 684.

13. **Carriers of Live Stock**—Element of Damage.—Where, in an action against a carrier for damages to sheep before delivery to consignee, it is alleged and proved that the market value of such sheep was depreciated by reason of the fact that they would not breed on account of the injuries sustained, and that this element of damage flowed directly from the injuries in question, the jury, under proper instructions from the court, may award plaintiff just compensation for the loss thereby sustained.—*Smith v. Hines*, Idaho, 196 Pac. 1032.

14. **Carriers of Passengers**—Attendant of Live Stock.—Rev. St. 1919, § 9938, requiring carrier to furnish a caboose for the transportation of attendant of live stock, does not require railroad to take caboose along with the live stock car to the unloading chute.—*Vulgamott v. Hines*, Mo., 229 S. W. 394.

15. **Negligence**—In a suit for injury to intending passenger, it appeared that a street car took an unexpected course, the back wheels going as they were intended and the front ones veering off by reason of a split switch and caus-

ing an unusual and dangerous movement of the car, which could not have happened except for some defect in the track or car or some negligence in its management. Held, that defendant had burden of explaining the casualty; the machinery and appliances being peculiarly within defendant's knowledge.—*Mayne v. Kansas City Rys. Co., Mo.*, 229 S. W. 386.

16. **Champerly and Maintenance**—Quantum Meruit.—Where an agreement as to an attorney's compensation for services was champertous under Rev. St. c. 124, § 12, the attorney was not entitled to receive the value of his services upon a quantum meruit.—*Orino v. Beliveau, Me.*, 113 Atl. 260.

17. **Constitutional Law**—Authority of City.—If the amendment to the Constitution of Texas in 1912, authorizing cities to adopt new charters, freed such cities from the restriction against binding street railway franchises concerning the rate of fare, that provision is irrelevant, where the franchise in question was adopted before the amendment.—*City of San Antonio v. San Antonio Public Service Co., U. S. S. C.*, 41 Sup. Ct. 428.

18. **Garnishment**—Rev. Code Del. 1915, § 4123, requiring a non-resident defendant, sued by foreign attachment, to give security to the value of the property attached as a condition of the right to appear and defend, which provision was substituted in 1877 for a provision adopted at an early date requiring special bail, as required by the statutes of various other states based on an old custom of the city of London, does not deprive such defendant of his property without due process of law, in violation of the Fourteenth Amendment, even though in a particular case defendant is unable to give such security.—*Ownbey v. Morgan, U. S. S. C.*, 41 Sup. Ct. 433.

19. **"Periods of Limitation"**—Transportation Act Feb. 28, 1920, § 206f, providing that "the period of federal control shall not be computed as a part of the periods of limitation in actions against carriers * * * for causes of action arising prior to federal control," held constitutional as applied to a cause of action by a shipper against the carrier as to which the period of limitation has expired before passage of the act, where such limitation was not fixed by contract, but by the carrier in its published and filed schedules as permitted by Interstate Commerce Act, § 20, as amended (Comp. St. § 8604a).—*Lazarus v. New York Cent. R. R., U. S. D. C.*, 271 Fed. 93.

20. **Public Lands**—The grant of lands to a railroad company by Act July 2, 1864, as modified by resolution of May 31, 1870, to induce the construction of a railroad, becomes a contract or its acceptance by the railroad company and the completion of the line, and the rights thereunder are then within the protection of the due process of law clause of the Constitution.—*United States v. Northern Pac. Ry. Co., U. S. S. C.*, 41 Sup. Ct. 439.

21. **Contracts**—Insuring Property in Storage.—Where plaintiff, who had only partially paid the purchase price of furniture, arranged to store it in the seller's warehouse, and the seller's credit man agreed to insure the property, both had an interest in the property, and their mutual benefit from insurance was sufficient consideration for the promise to insure.—*Siegel v. Spear & Co., N. Y.*, 187 N. Y. S. 284.

22. **Corporations**—Withdrawal of Majority.—Upon the withdrawal of a majority from an organization or corporation, not for profit, those remaining in the organization or corporation constitute the true association and are entitled to the use and enjoyment of the association's property.—*Clearwater Citrus Growers' Ass'n v. Andrews, Fla.*, 87 So. 903.

23. **Damages**—Depreciation.—The value of used tablecloths and other linen may be ascertained by making suitable reduction, from price paid therefor, for depreciation from use, and not by its second-hand market value.—*Shanfield v. Feiman, N. Y.*, 187 N. Y. S. 266.

24. **Divorce**—Ground For.—Impotency is an incurable incapacity that admits neither copulation nor procreation, the copulation contemplated being copula vera; and mere barrenness or absence of conceptive power is not impoten-

cy, and is no ground for divorce, if there is complete power of copulation.—*Smith v. Smith, Mo.*, 229 S. W. 398.

25. **Electricity**—Degree of Care.—An owner of steel towers carrying high-tension electric lines also owning other wires strung on wooden poles which at one point were within 12 or 15 inches of the corner of one of the towers, was not bound to anticipate that a boy would climb the tower to a height of 30 feet and circle around it on the narrow crossbars and take hold of such wire near the tower in reliance on the fact that it was "padded," though it knew boys played in the field where the towers were, where its employees had never seen boys on the towers, and no other children had ever attempted to perform the dangerous feat in question.—*Bonniwell v. Milwaukee Light, Heat & Traction Co., Wis.*, 182 N. W. 468.

26. **Trespasser**—Where an electric power company had a right of way across plaintiff's land, and erected a tower to support its wires thereon, and thereby had a right to use the land immediately under the tower, it might to that extent be said to be the owner of the land occupied by the tower; so that where plaintiff's 14-year-old son, for his amusement, started to ascend the tower, without the permission of defendant or his agents, and was killed by the electric current, the boy was a trespasser.—*McCoy v. Texas Power & Light Co., Tex.*, 229 S. W. 623.

27. **Exemptions**—Life Insurance Policies.—When one takes out policies of insurance on his life, payable to his executors, administrators or assigns, they become his property subject to the claims of his creditors.—*Bank of Minden v. Clement, U. S. S. C.*, 41 Sup. Ct. 408.

28. **False Imprisonment**—Saucy Language to Policeman.—Arrest of a girl, who had committed no offense and who was minding her own business, but who, on being improperly addressed by policeman, talked saucily to him, and called him a "big prune," held illegal, entitling the girl to damages for wrongful arrest.—*Scott v. Feilschmidt, Iowa*, 182 N. W. 382.

29. **Husband and Wife**—Deserted Wife Liable on Contracts.—Where a husband deserts his wife and departs from the state, leaving her without maintenance or support, and remains absent therefrom continuously, with an intent to renounce the marital relation, and leaves her to act as a feme sole, and she so acts, she is liable to be sued on her contract, the same as though she were unmarried.—*Peterson Bros. & Co. v. Gunnarson, Neb.*, 182 N. W. 505.

30. **Insurance**—Compliance with Provision.—There could be no recovery on a burglary insurance policy requiring insured to keep such books and accounts that the exact amount of loss might be accurately determined, where no books or record were kept indicating what merchandise had been sold during the year previous to the day of the loss, without relying on insured's knowledge of the stock, not contained in books or accounts, or on expert testimony based on comparisons of inventories with the addition of purchases and subtraction of sales in connection with an assumed rate of profit.—*Harris v. General Acc., F. & L. Assur. Corp., N. Y.*, 187 N. Y. S. 291.

31. **Eligibility**—Where, on death of member of a fraternal organization, a person originally designated as a beneficiary and two other persons subsequently substituted as beneficiaries claimed the amount payable on the certificate, and the order filed its petition for interpleader and deposited the amount of the certificate in court, the substituted beneficiaries cannot raise any objection as to the eligibility of the person first named to be a beneficiary under the by-laws of the order, for such objection could be raised only by the order itself, and by the deposit in court the order waives the objection.—*Shinholser v. Henry, Ga.*, 106 S. E. 719.

32. **Intoxicating Liquors**—Unlawful Search and Seizure.—Seizure of liquor from a private residence prior to the taking effect of Const. Amend. 18, on a search made without a warrant by officers armed with shotguns and pistols, although there was invitation to enter and consent to the seizure, held unlawful, and the owner of the liquor held entitled to its return.

—United States v. Marquette, U. S. D. C., 271 Fed. 120.

33.—**Warrant to Police Officer.**—Under U. S. Rev. St. § 1014, a valid warrant may be issued directed to a police officer of a city to arrest for violation of the National Prohibition Law, commonly known as the Volstead Act.—Harris v. Superior Court, Cal., 196 Pac. 895.

34.—**Landlord and Tenant.**—Breach of Contract.—In an action wherein tenant obtained damages for breach of contract to rent land, an assignment that verdict of jury was contrary to the evidence, in finding that landlord breached the contract to tenant's damage, because it was conclusively shown landlord offered to let tenant have another tract of land in every respect equally as good in quality and condition as the tract he did not get, was without merit, since the tenant had a perfect right to insist upon the contract he made.—Hulshizer v. Nelson, Tex., 229 S. W. 658.

35.—**Lessee's Rights.**—A lessee's rights under lease as against innocent purchaser were not affected by the erroneous acknowledgment of receipt of lessee's subsequently returned check by employee of purchaser's agent who had been instructed not to accept check from lessee for rent.—Great Atlantic & Pacific Tea Co. v. Cofer, Va., 106 S. E. 695.

36.—**Life Estates.**—Cutting Timber.—Timber cut from land in possession of life tenant unauthorized to cut such timber, becomes the property of the remaindermen, whether cut by the life tenant or a third person.—Jones v. Sandlin, Ala., 87 So. 850.

37.—**Master and Servant.**—Assuming Risk.—A plaintiff who accepted employment as railroad telegraph operator in a box car office, knowing that the place was leaky, cold, and wet, held to have assumed the risk from such exposure.—Newberry v. Central of Georgia Ry. Co., U. S. D. C., 271 Fed. 117.

38.—**Compensation to State.**—The provision of Workmen's Compensation Law, § 15, subd. 7, for payment to the state treasurer of \$100 in every case of injury causing death, where there is no person entitled to compensation is valid.—Watkinson v. Hotel Pennsylvania, N. Y., 187 N. Y. S. 278.

39.—**Defective Coupling.**—The uncoupling of the end car upon the stoppage of a train being backed is proof under the Safety Appliance Act (U. S. Comp. St. §§ 8613-8615) that the coupling was defective.—Stewart v. Wabash Ry. Co., Neb., 182 N. W. 496.

40.—**"Net Profits."**—A manager of a merchandise department of a going concern paying him a percentage on the "net profits" of his department at the close of the year was not entitled to credit for profit on unfilled orders which were subject to cancellation, nor was he entitled to have considered as profit the difference between the cost price of goods on hand and their market value, and he was not entitled to credit for an item of expense for shelving and flooring to protect goods from damage which was properly chargeable to "expense"; the term "profits" in a legal sense, as distinguished from speculative or "paper profits," signifying the excess of receipts over expenditures, and "net profits," meaning the difference between "income," what has come in, and "outgo."—Tooley v. C. L. Percival Co., Iowa, 182 N. W. 403.

41.—**Right to Recovery.**—Under Workmen's Compensation Law, § 29, as amended by Laws 1917, c. 705, until there has been an award of compensation to an injured employee, he is free to forego compensation under the Compensation Law and pursue his right to recovery of ordinary damages from the true tortfeasors; it not being the electing to claim compensation under the Compensation Law, but the actual awarding of it, which is decisive and binding.—Godfrey v. Brooklyn Edison Co., N. Y., 187 N. Y. S. 263.

42.—**Monopolies.**—Restraint of Interstate Commerce.—An agreement between members of labor unions, comprising longshoremen and others concerned with the handling of merchandise shipped by water at the port of New York, that they would not handle any merchandise transported or operated on in any way by any individual, firm, or corporation refusing to recognize the unions, pursuant to which employees of a steamship company, who were members of such unions, refused to check, weigh, or load

merchandise offered by complainant for interstate shipment, on the ground that it was brought to the pier by a transfer company which employed both union and non-union men, and the steamship company refused to receive the shipment because its employees would not handle it, though the transfer company offered to load it, held to constitute an unlawful combination in restraint of interstate commerce, in violation of the Sherman Anti-Trust Act, and to entitle complainant to an injunction in a suit in a District Court, brought under Judicial Code, § 24 (23).—Buyer v. Guillian, U. S. C. C. A., 271 Fed. 65.

43.—**Recovery of Penalty.**—Where the specifications for pavements were drawn so as to require the use of a road binder of which defendant had a monopoly, the contractor who bid on the work on those specifications, on defendant's assurance that it would furnish the binder at six cents a gallon may not, defendant having raised the price, recover the statutory penalty provided by Burns' Ann. St. 1914, § 3872, notwithstanding the arrangement between defendant and the board of county commissioners, etc., and others was in furtherance of a monopoly, and so was criminal under sections 3866 and 3868.—Moore v. Barrett Co., Ind., 106 N. E. 649.

44.—**Mortgages.**—Deed to Secure Money.—A deed absolute in form is, in fact, a mortgage, when given to secure the payment of money, even though the parties may have agreed that, upon default in payment within a fixed time, the deed should become absolute.—McKean v. McLeod, Okla., 196 Pac. 936.

45.—**Municipal Corporations.**—Delegation of Power.—While Burns' Ann. St. 1914, § 8655, subd. 16, declares that the common council of every city shall have power to regulate the location and management of cemeteries within the city and for four miles without, etc., a municipal ordinance, providing that no cemetery shall be established or used within the city or within four miles of its limits until a plat of the cemetery has been approved by the board of public works and common council, is invalid, being an attempt to confer arbitrary powers on the specified city officers.—Park Hill Development Co. v. City of Evansville, Ind., 130 N. E. 645.

46.—**Street Improvement.**—The courts cannot say as a matter of law that a railroad road-bed or right of way was not benefited by the improvement of an abutting street.—City of Grand Rapids v. Grand Trunk Ry System, Mich., 182 N. W. 424.

47.—**Navigable Waters.**—Obstructions.—That artificial obstructions exist in a stream, capable of being abated by due exercise of public authority, does not prevent the stream from being regarded as navigable in law, or take away the authority of Congress to prohibit added obstructions, if, supposing them to be abated, it be navigable in fact in its natural state.—Economy Light & Power Co. v. United States, U. S. S. C., 41 Sup. Ct. 409.

48.—**Pawnbrokers and Money Lenders.**—"Wage Broker."—Where a merchant, on an employee's making an assignment of future wages, advanced him moneys to live and pay his bills, and the merchant, though denying that the advances were on the assignment, stated that but for it they would not have been made, the merchant must be deemed a wage broker, within Laws 1911, c. 56, § 3, declaring that any person, company, or corporation giving or loaning money to any wage-earner, on consideration of any assignment of wages, shall be deemed a "wage broker."—Costello v. Great Falls Iron Works, Mont., 192 Pac. 982.

49.—**Poisons.**—Police Power of State.—Laws Minn. 1915, c. 260, § 2, prohibiting a physician from furnishing drugs to habitual users, though authorizing him to give prescriptions therefor in good faith, does not interfere with the enforcement of the Harrison Anti-Narcotic Act, though the federal act permits the physician to dispense the drugs directly.—State of Minnesota v. Martinson, U. S. S. C., 41 Sup. Ct. 425.

50.—**Principal and Agent.**—Renewal of Contract.—A contract gave plaintiff exclusive agency for sale of goods made by defendant in certain territory for a specified term, and provided that it should be renewed for an additional five years, if the net sales "shall have amounted to the sum of \$50,000 for the year

1915, and shall have increased 10 per cent, each year for the two years following, and thereafter shall have showed 5 per cent net increase annually during the life of the contract." It further provided that, in the event of a general depression in business, "the said second party shall not be required to make the yearly increase in sales as provided herein during the period in which said depression occurred." Held, that the latter provision did not apply to sales during 1915, and that net sales of \$50,000 during that year were an essential requirement to the right of plaintiff to a renewal of the contract.—*Ohio Valley Pulley Works v. Oneida Steel Pulley Co.*, U. S. C. C. A., 271 Fed. 57.

51. **Railroads**—Injury to Employee of Express Company.—The order of the Director General in requiring actions and suits to be brought against him and not otherwise does not, under Act Cong. March 21, 1918, § 10, authorizing actions against carriers under federal control as then provided by law, prevent an employee of an express company who was injured while the company was under control of the Director General from maintaining an action against the company.—*American Ry. Express Co. v. Compton*, Ala., 87 So. 810.

52. **Removal of Causes**—Non-Resident.—Under Jud. Code, § 29, authorizing removal to the District Court for the proper district of suits which could have been originally brought in the United States District Court, a suit in which both plaintiff and defendant were non-residents of the state in which the suit was brought and of the district cannot be removed to United States District Court by the defendant without the consent of the plaintiff.—*Coalmont M. Coal Co. v. Matthew Addy S. & C. Corp.*, U. S. D. C., 271 Fed. 114.

53. **Sales**—Divisible Contract.—At common law, prior to the enactment of the Personal Property Law, where a single contract of sale was divisible, as where it embraced kinds or grades of goods at specified prices for each, the goods of one kind or grade might be accepted and others rejected by the buyer, in the absence of evidence that the prices were fixed with reference to the entire quantity.—*Portfolio v. Rubin*, N. Y., 187 N. Y. S. 302.

54.—Measure of Damages.—Where a complaint alleged a written contract under which plaintiff agreed to sell to defendant at the city of New York 500,000 French francs, check on Paris, at 8.33 francs per dollar, and it appeared that, within a few days after defendant had notified plaintiff of repudiation, plaintiff sold the francs in the city of New York at 16.56 francs per dollar, crediting defendant with the amount realized, and defendant still remaining indebted to plaintiff for a certain amount, for which judgment was demanded, held, that the measure of damages, in the absence of special circumstances showing proximate damage of a greater amount, was, under Personal Property Law, § 145 (3), the difference between the contract price and the market price at the time when the money ought to have been accepted.—*Guaranty Trust Co. of New York v. Meer*, N. Y., 187 N. Y. S. 288.

55.—Severable Contract.—Where a retail merchant orders from a manufacturer of shirt-waists a number of such waists of different kinds and qualities, a definite price being fixed for each of such different kinds and qualities, such contract is separable in the absence of any circumstances indicating the contrary, and if the seller, in fulfillment of his contract, furnishes some of the different items in compliance therewith, and others which are not of the kind and quality stipulated for, the purchaser will have the right to accept such of said lots as comply with the contract, and to reject such as fail to comply therewith.—*Regent Waist Co. v. O. J. Morrison Department Store Co.*, W. Va., 106 S. E. 712.

56.—Warranty.—In an action for damages for breach of such a warranty, negligence of the manufacturer is not an issue, and it is no defense that the tank company used reasonable care in selecting material for the tank and in constructing it.—*American Tank Co. v. Revert Oil Co.*, Kan., 196 Pac. 1111.

57. **Street Railroads**—Care as to Children.—Where it is shown that children were permitted

and accustomed to climb upon the outside of a street car and cling to and ride upon the coupling bar and elsewhere on the outside of the car while the car was making a backward movement on a Y switch, and while the motorman was operating the car from the other end of it, and the conductor had alighted from the car, and when there was no one in front to watch that the children should not be injured, there is evidence of negligence for which the street car company may be liable if one of the children, too young to be guilty of contributory negligence, is injured thereby.—*Bellamy v. Kansas City Rys. Co.*, Kan., 196 Pac. 1104.

58.—Contributory Negligence.—The driver of a wagon has equal rights with the operator of a trolley car in the public highway and can assume that the motorman of the car saw him emerging from the intersecting street and had his car under control, and that the motorman would respect the driver's right to cross the tracks safely.—*Wilhelm v. Public Service Ry. Co.*, N. J., 113 Atl. 239.

59. **Taxation**—Non-Resident.—Income tax levied under Tax Law, § 351, on income of a non-resident cotton goods merchant derived from his business carried on in the state of New York, held not a tax on exports, with reference to the merchant's direct export business, in violation of Const. U. S. art. 1, § 10.—*People v. Travis*, N. Y., 187 N. Y. S. 311.

60. **Telegraphs and Telephones**—Obstruction of Street.—A telephone company, which so placed a guy wire in a street as to create a dangerous obstruction, held not relieved from liability for an injury caused thereby, because its line was being operated at the time by the government.—*Cumberland Telephone & Telegraph Co. v. Lawrence*, U. S. C. C. A., 271 Fed.

61.—Telegram as Interstate Commerce.—The transmission of a telegram from one point in the state to another point in the state by a route taking it outside of the state held interstate commerce within the Carmack Amendment and Act June 18, 1910, § 7, and not intrastate commerce, where the message could not have been transmitted wholly within the state without a physical change in the arrangement of the system of wires and the additional services of another operator, so that the rule of damage in action for negligent delay in delivery was the federal, and not the state, rule.—*Western Union Telegraph Co. v. Beasley*, Ala., 87 So. 858.

62. **United States**—Extra Compensation to Contractors.—A firm which had contracted with the government to remove clay, gravel, sand and boulders from a navigable stream is entitled to extra compensation for the removal of a bed of limestone rock, notwithstanding provisions making the decision of the engineer officer in charge as to the quality and quantity of the work final, and requiring his instructions to be observed by the contractor and the order of the engineer to remove the rock under the contract.—*United States v. L. P. & J. A. Smith*, U. S. S. C., 41 Sup. Ct. 413.

63. **Warehousemen**—Public Use.—A tobacco buyer is prima facie entitled to attend tobacco sales in public warehouses and to bid therein, and the warehousemen will be temporarily restrained from interfering with such right pending the final trial at which the sufficiency of the warehousemen's grounds for excluding him will be determined.—*Gray v. Central Warehouse Co.*, N. C., 106 S. E. 657.

64. **Wills**—Instrument with Reservation of Use for Life Held a "Deed."—Instrument, designated a "deed," whereby owner of land, in consideration of love and affection and the payment of \$1, "do grant, bargain, sell, and convey" the land to named persons, reserving to herself the use and control of the land during her natural life, held a deed, and not a will, the operation thereof not being postponed until her death.—*Marsh v. Rogers*, Ala., 87 So. 790.

65.—Intent.—A will giving property to a daughter's children, grandchildren, and great-grandchildren "now living" or "hereafter born" will be construed to exclude children not in esse at testator's death for the reason that it is improbable, unless otherwise clearly expressed, that testator should desire to postpone the distribution of his estate so long.—*Merrill v. Winchester*, Me., 113 Atl. 261.

Central Law Journal.

St. Louis, Mo., July 22, 1921.

NEW UNIFORM ACTS WHICH WILL BE DISCUSSED THIS YEAR BY THE CON- FERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS.

Lawyers are becoming more interested every year in the work of the Conference of Commissioners on Uniform State Laws. This is illustrated by the number of requests for the Conference's indorsement or assistance in preparing model statutes of various reform propositions. Thus, requests have come for a model "arbitration statute," a "marking and labeling law," a blue sky law, etc.

The Conference endeavors to serve both the reformer and the codifier. With respect to reform measures the position of the Conference is not that of an active propagandist, but rather that of adviser of those legislators who believe they have received a mandate to put a certain reform into action. Thus, the Conference, at the suggestion of those interested and in order that if the proposed reform measures are to be adopted in a particular state, they should be put into proper shape, have prepared the following model statutes, putting into effect certain well known reforms, namely: Uniform Desertion and Non-Support Act; Uniform Child Labor Act; Uniform Marriage Evasion Act; Uniform Cold Storage Act; Uniform Workmen's Compensation Act; Uniform Foreign Acknowledgments Act; Uniform Land Registration Act; Uniform Act for the Extradition of Persons of Unsound Mind; Uniform Flag Act; Uniform Vital Statistics Act, and the Uniform Occupational Diseases Act. On the other hand, the Conference regards the codification of important subjects of law which affect commerce as its greatest work and it has produced the following celebrated codes, namely: The Uniform Negotiable Instru-

ments Law; The Uniform Sales Act; The Uniform Warehouse Receipts Act; The Uniform Bills of Lading Act; The Uniform Conditional Sales Act; The Uniform Fraudulent Conveyance Act, and the Uniform Partnership Act.

The Conference proceeds carefully and leisurely, so much so that often the patience of zealous reformers is taxed to the utmost. An example of this was seen in the meeting of the American Bar Association itself, when on the floor of the Association meeting a committee was ordered to draw up and put into immediate effect a "declaratory judgments act," to be recommended for adoption. The action was taken at the fag end of an afternoon session. The suggestion that this act was under consideration by the Conference of Commissioners on Uniform State Laws was met with the argument that this law was needed at once. But every lawyer knows that no bar association committee is likely to take the responsibility of drafting an act on such a new and important subject overnight to suit the immediate purposes of certain reformers, and that if they did, it would deserve and receive little consideration from the legislatures.

The character of the work performed by the Conference is illustrated by the five measures which will consume the entire time of the Conference this year for one week in morning, afternoon and night sessions. Notwithstanding this great expenditure of time and energy, it is quite possible that no act will be recommended by the Conference, although one of the tentative acts to be considered has been before the Conference for seven successive years. The following acts will be considered by the Conference at its session at Cincinnati, August 24-30, 1921, namely:

I. The Eighth Tentative Draft of a Uniform Incorporation Act;

II. The First Tentative Draft of a Uniform Fiduciaries Act;

III. The Second Tentative Draft of a Uniform Declaratory Judgments Act;

IV. The First Tentative Draft of a Uniform Mortgage Act;

V. The First Tentative Draft of a Uniform Aviation Act.

It will be seen by the character of the bills to be considered by the Conference this year, how wide is the scope of the work and of the objectives of this great organization. Although it goes about its task with no flourish of trumpets and no press agent propaganda, it has already exerted and will continue to exert, so long as it retains the confidence and receives the active support of the bar, a far-reaching influence for good upon the legislation of the country.

The success of the Conference is without doubt due to the high character and exceptional intelligence of those who participate in the work of this Conference. Thus, the debates of the last conference at St. Louis were led by such men as Walter George Smith, of Philadelphia; Prof. Samuel Williston, of the Harvard Law School; Nathan William MacChesney, of Chicago; S. K. Child, of Minneapolis; Charles Thaddeus Terry, of New York; William A. Blount, of Pensacola; Ernst Freund, of the University of Chicago; Merrill Moores, of Indianapolis; Hon. Thomas C. McClellan, Justice Supreme Court of Alabama; George B. Young, of Montpelier, Vt.; Wm. C. Kinkad, of Cheyenne, Wyo.; John H. Wigmore, of Northwestern University; W. O. Hart, of New Orleans; George T. Beers, of New Haven, Conn.; Hollis R. Bailey, of Boston; A. T. Stovall, of Okolona, Miss.; Hon. H. A. Bronson, Justice Supreme Court of North Dakota; Prof. Eugene A. Gilmore, of the University of Wisconsin; James R. Caton, of Richmond, Va.; Prof. George G. Bogert, of Cornell University, and many others. It is a rare intellectual treat to be present at these discussions which reveal the hidden defects in the phraseology of the tentative drafts under considera-

tion and enable the committees in charge of the various bills submitting to this veritable third degree of destructive and constructive criticism, an opportunity to prepare a second or third draft in much more accurate language. It is no wonder that experienced legislators are so quick to see the value of work of this kind in the process of statute making and that one of them recently was forced to declare, after a thorough study of the Uniform Sales Act, that he had never seen a more perfect sample of legislative draughtmanship.

We take pleasure in commending the work of this Conference to the lawyers of this country. It belongs to the bar. It was authorized in 1889 by the American Bar Association by a resolution which called upon the governors of the various states to appoint delegates to a Conference to Promote Uniformity of Legislation in the various states. No more valuable agency exists today for making our laws more accurate and effective. It is a work that must continue for years to come before it will have been even partially completed. Only a few years ago the Conference entered upon a task that will take a generation to complete, namely, the effort to bring about uniformity of judicial decisions. This work was started by making a careful review of the decisions of the Uniform Negotiable Instrument Act with the purpose of bringing into line with the current of authority every court whose decisions tended to defeat the very purpose its own legislature had in view when it passed the Act, namely, to make the law of that state uniform with the law of every other state. It is interesting to note how effective such criticism is in bringing appellate courts to a realization of the purpose of these uniform acts and into making an effort to bring their decisions into conformity with those of other jurisdictions. Where, however, contradictions in judicial decisions cannot be brought about

by suggestion and friendly criticism, or where the decisions themselves disclose a patent ambiguity in some particular section of the Act, the Conference prepares a uniform amendment to the Act which it recommends to each state legislature. This promptly cures the defect.

We believe it to be to the interest of every lawyer as a lawyer, as well as a citizen, to bring about the passage of all the great codifications of commercial law proposed by this Conference, and such of the special acts as comport with the policies of his particular state. Uniformity is especially desirable in the great commercial codes to the end that commerce may flow freely and without the fear of uncertainty with respect to obligations created by ordinary commercial compacts brought about by loose, ambiguous and widely divergent state laws.

NOTES OF IMPORTANT DECISIONS

LAW PROHIBITING REMOVAL OF UN-TAXED LIQUORS REPEALED BY VOL-STEAD ACT.—Just how far former laws regulating the sale and transportation of intoxicating liquors are enforceable has been the subject of much recent discussion. In the recent case of *Reed v. Thurmond*, 269 Fed. Rep. 252, it was held that the Volstead Act was a radical departure from the policy of the former laws to derive revenue therefrom, and completely covers the same subject-matter including the transportation of such liquors, so that it impliedly repealed Rev. St. § 3296, which imposed on the removal from a distillery of liquors on which the tax had not been paid a penalty more severe than was imposed by the Volstead Act on the illegal transportation of liquor.

In this case defendant was prosecuted under section 3296 of the Revised Statutes for unlawfully removing certain distilled spirits upon which the tax imposed by this statute had not been paid from a certain distillery. Reversing a conviction under this indictment, the Court of Appeals (4th Cir.) said:

"Under the most familiar rules of statutory construction, that if the Volstead Act is inconsistent with the provisions of section 3296 and also covers the same subject-matter, it supercedes and by implication repeals that sec-

tion. And to our minds the Volstead Act in its entire scope and purpose, is plainly inconsistent with the scheme of revenue protection embodied in the Revised Statutes and in the section under review.

"Specifically it is enough to point out that under the former law defendant incurred the penalty for the offense of which he was convicted of both fine and imprisonment, whereas under the present law the punishment for a first offense is limited to a fine of not more than \$500. Nor does it seem doubtful that the Volstead Act embraces the entire subject-matter of section 3296. Certainly it covers everything defendant did or was accused of doing; that he could have been convicted under it is not open to question. In short, we are of opinion that offenses of the kind here in question, which have been committed since the Volstead Act went into effect, are punishable only under that act."

The same result was reached in *United States v. Windham*, 264 Fed. Rep. 376, where the Court said:

"Taking the new statute as a whole, its provisions would appear to cover and provide for the punishment of every act which could be punished under the former provisions of the Revised Statutes with regard to the manufacture and sale of liquors for beverage purposes. To hold that the old law is continued would therefore be to hold that two inconsistent sets of statutory provisions punishing the same substantial act, and with differing penalties, were of force, and that a person could be prosecuted and punished under section 3 and section 6 of the new statute for transporting any liquor at all, without the required permit, and at the same time prosecuted and punished under the provisions of section 3296 for transporting liquor without having previously paid the tax that he is forbidden by law to pay."

IS AN ACTION UNDER THE WORKMEN'S COMPENSATION ACT ONE IN CONTRACT, TORT OR FOR ENFORCEMENT OF A STATUS OBLIGATION?—The California Law Review calls attention to an important case in that state construing an act extending the benefits of the California Workmen's Compensation Act to "controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state." The Supreme Court of California, on the first hearing, held this act unconstitutional as an attempt to extend the operation of the laws of California beyond its territorial limits. On rehearing, however, the court receded from this position and held the act constitutional on the theory that it was not a wrongful act (or tort) for which a defendant must pay under the Act, but an obligation arising out of a status or relation created

in California. *Quong Ham Wah v. Industrial Accident Commission*, 192 Pac. 1021. In justification of this decision, the Court says that this statute can only mean that an act occurring beyond the geographical limits of the state is recognized as the basis for the creation, or condition for the enforcement, of a right created and enjoyed within California.

The California Law Review calls attention to the fact that all obligations are classified as contractual or delictual, and that this classification is too rigid for the new rights and obligations created by laws like the Workmen's Compensation Acts, which recognize the duty of society to protect those who labor in dangerous occupations. On this point our learned contemporary says:

"The courts have apparently felt impelled to classify the obligation as either contract or tort. Some have held that compensation acts, though not strictly delictual, were designed partially to supersede a particular branch of the law of torts, and are co-extensive in their territorial application with the laws thus superseded. The rule of conflict of laws applicable to torts generally is therefore invoked, and the acts held to have a strictly territorial operation only. The prevailing theory, however, is that the obligation created by such an act rests on 'contract.' The provisions of the act enter into the terms of the contract of hiring and regardless of where the accident occurs compensation is recoverable in the state where the contract was made, being purely a discharge of a contract obligation. The principal case rejects both the territorial rule and the contract theory. The act does not create a tort liability. The modern theory of the law of torts is predicated on fault, whereas compensation rights and obligations have no reference is made optional either on the part of the employer. Nor is it contractual in a strict sense. The contract theory may perhaps fit those optional acts, where the application of the act is made optional either on the part of the employer or the employee. But the California act is compulsory. The liability to pay compensation does not rest on the mutual agreement of the parties; it arises from the law itself. The principal case decided that the obligation created by the act is a 'law-imposed liability, in a class by itself, being neither strictly contractual nor delictual.'"

It seems to us that the obligation here created is rather that arising out of a status than out of a private wrong. The contract itself is as immaterial as is the marriage contract in governing the relationship or status arising out of the contract. Parties are free to contract to create the relationship of employer and employee, but the law may attach to the relationship thus assumed whatever obligations it sees fit to impose. Since all obligations arising out of status or one's personal relationships are controlled by the law of one's

domicile, the decision of the California Supreme Court could be upheld on that ground. If parties enter into a relationship in California and one of the obligations of this relationship is incurred by an event happening in another state while the parties are still citizens of California, it is altogether proper, under this theory, that the rights of the parties should be governed by the law of their domicile.

THE LAW'S DELAYS AND WHO IS TO BLAME.*

Mr. W. M. Cain wrote an article for the *Central Law Journal* of May 7th, 1920.¹ The *Central Law Journal* of July 30th, 1920, contains an elaboration of the subject-matter of Mr. Cain's article, by Mr. Justice H. A. Bronson of the Supreme Court of North Dakota (of which the writer has also the honor of being a member), under the title of "The Law's Delays In Appellate Procedure."²

In his article Mr. Justice Bronson demonstrates quite clearly the beneficent results which have followed the adoption by the Supreme Court of North Dakota of a system of procedure for the guidance and government of the members of the Court in the discharge of their respective duties.

The result of operating under this procedure has been to eliminate delay and to bring the work of this Court entirely up, so, that, at the expiration of each month, there remain no undetermined nor undecided cases. In other words, we have a term of court, commencing on the first Tuesday of each month, at which all cases on the calendar must be argued and submitted.

For example: fifteen days before the first Tuesday of each month all appeals then accumulated are placed on the calendar for argument and decision. The decisions of the different cases on the calendar

*This explanation of the new rules of procedure of the Supreme Court of North Dakota by one of the Judges of that Court will no doubt be read with much interest by lawyers in other states.

(1) 90 Cent. L. J. 333.

(2) 91 Cent. L. J. 83.

any month are always completed and wholly disposed of before the next ensuing monthly term. This Court is entirely up with its work. It is always waiting for work to accumulate. In other words, it is always ahead of its work.

There is no doubt that the law's delays most frequently result in the denial of justice. The law's delays, which could be wholly avoided, it is quite safe to say, at least double the expense of litigation. We have no way of knowing how many millions, or hundreds of millions, of dollars, are annually expended within the United States in litigation, but, unquestionably, it is a vast sum. And, doubtless, half this enormous sum could be saved to the litigants.

The reason of the results which have been obtained, as set forth in Justice Bronson's article, are the rules of procedure adopted by this Court for its guidance and government, in the discharge of its duties, all of which it was the writer's privilege to originate and to procure to be adopted by this Court.

In order that the bench and bar may understand the nature of those rules, we will here indicate the substance of them. But, before doing so, we wish to observe that, at the meeting of almost every State Bar Association, or meeting of the American Bar Association, much has been said and much thought has been expended to originate or invent some way of curing the law's delays. But nothing has ever been done. The question has been held one not admitting of solution. As far as we are concerned, we are fully convinced this is wholly a mistaken conclusion. The law's delays can be wholly eliminated. And, if the writer ever has the opportunity of attending a meeting of the American Bar Association, he would not hesitate to state, and to demonstrate, that it can be done. The way to eliminate the law's delays is to eliminate them; and the principal elements which will assist in the elimination are: the adoption by Courts of proper rules,

relative to the discharge of their duties, and the application of systematic work thereunder.

But, to proceed further, when the writer became a member of the Supreme Court of North Dakota, he found that there were 150 cases which were of record in this Court, awaiting argument and decision; and, of course, thereafter cases continued coming at the rate of about 20 to 25 per month. It, indeed, was a formidable task to bring all of the work up to date; *i.e.*, to hear and decide the 150 accumulated cases and dispose of the new ones accumulating each month, as above stated.

Under the procedure then existing, which will be shortly explained, it seemed impossible to make any progress in bringing up the work. In fact, after working two years exceedingly hard, it became apparent that the work never could be brought up under the then existing mode of procedure.

That procedure was, in short, about as follows:

Assume there were placed on the calendar at a given term, 40 cases for argument and decision, and then, after conclusion thereof, the Chief Justice would assign the cases, in equal number, to the members of the Court, who were five in number. In the course of time each Judge would formulate and circulate the opinions in all of the cases which were allotted to him. Then, some day, a conference would be called, not because there was any rule fixing a day of conference, but because some member, or members, of the Court would finally conclude there should be a conference. In other words, it was a conference by accident, rather than design. At that time, it was also the custom among the Judges, when they had written a case, to inquire of the others if they agreed or disagreed with it, and if they agreed, they would have them sign it, or, sometimes, this was done in conference. But in any event, at that time an opinion had to be disposed of by all five Judges, either by signing it, or by a

majority signing and the remainder by dissenting from it:

In other words, every Judge had to act upon every opinion before it could be filed, so that if four Judges signed the opinion, and one had not made up his mind, and had arrived at no decision, the case was held up interminably. Many were thus held up for six months, some as long perhaps as eight months or a year.

I preserved a list of one lot of these accumulated cases, in which opinions were written and circulated, but were not disposed of for the reason that one or more of the Judges had not arrived at a decision. It is a list of 73 cases, or matters, at one time awaiting final disposition. Now, just imagine a Judge endeavoring to carry around in his head, from week to week and from month to month, 73 law suits or matters upon which decisions were required. To cure this evil, the writer suggested a rule which, in substance, provides, that when an opinion is circulated, and at conference is signed by three members who agree with it, it is then immediately filed with the clerk, and if not signed by or dissented from by the other two members within ten days, it becomes the decision in the case.

This rule worked like magic. Within a year after its adoption, the 150 cases above mentioned had been disposed of, and the work of the Court was entirely up. The delay in the decision of cases was wholly eliminated. Instead of a litigant waiting from a year to a year and a half for a decision, he gets it within thirty days after the case is argued in this Court.

Surely, in the average case, after an opinion has been written therein and circulated, ten days is sufficient time within which any Judge should make up his mind, either to agree with the opinion written or dissent. If a given case is particularly complicated, and a Judge desires a few days additional, the Court may extend the ten-day period, but no Judge so far has found any need of applying for additional time.

Another rule which greatly assisted in bringing up the work, was one providing for a conference at three o'clock on Tuesdays and Fridays of each week. This was also adopted and now when three o'clock comes on these days, every Judge starts for the conference chamber. He does not have to be told; he does not have to ask any other Judge, or Judges, for a conference. Automatically, that matter is arranged.

Another rule is one that automatically assigns the cases to the Judges, wherein they are to formulate opinions. It may be explained as follows:

When the record on appeal arrives at the clerk's office, he files it, noting thereon the date and hour of filing; and, for the sake of clarity, we will assume there are five such cases filed, and that the first is filed on the first day of March, and other four cases filed in the following order: one on the second, one on the third, one on the fourth, and the last on the fifth day of March. The names of our Judges are then arranged in alphabetical order, and, as arranged they are B, B, C, G and R. Now, the first case filed goes to B, because it was filed first, the next case filed goes to the second B, the third to C, the fourth to G, and the fifth to R. All cases are thus assigned automatically, as they are filed.

The time of filing operates automatically to assign the cases to the Judges. The clerk must file the cases in the order they are received by him. If he should receive two or more records in the same mail, he may file that which he happens to examine first.

This rule is found to be of much advantage, for it distributes the work evenly among the judges, not only as to the number of cases assigned, but also as to the degree of difficultness of them. In other words, a Judge, in the course of any given period of time, will draw just as many difficult cases as those that are less difficult, or those which are simple in character and easy of solution.

Again, as is well known, there are quite a few cases which reach an Appellate Court which have a political tinge. Certain electors or citizens, who are members of a certain political party or organization, may bring an action or proceeding by which they hope to gain some advantage for their organization, or for some member of it, or for some particular officer elected or to be elected, etc. There may be a Judge on the bench of the same political belief, as well as other Judges opposed to that political belief. Under this rule, the case on appeal is just as liable to come to the Judge opposed to the particular political belief of those maintaining the action as to the one of like political belief; and, even if it be assumed that Judges are free from political bias, which is quite a violent assumption, it is at least certain, under this rule, that the case is just as liable to fall to one judge as another. So, that, under this rule of assignment, there is no certainty at least that such case shall fall to the Judge who may be of the same political belief as those seeking some advantage or benefit by the action. In other words, this rule leaves the members of the Court free from criticism along these lines, as there can be no partiality in the assignment of the case, as that occurs automatically.

This rule has the further effect to strengthen the Court as a whole. If, for instance, one Judge is a specialist in real property, another in negotiable instruments, etc., the tendency was, by the old method of assignment, to turn those cases in which those questions were presented to those respective Judges, and assign the other members of the Court cases of a different nature. By the rule adopted here, each member is required to write the case which comes to him. It tends to strengthen him in every branch of the law. And if there should be one who is a specialist in any particular branch of law, he will have opportunity at conference for criticism of any opinion which considers principles of law that come within his specialty.

Another rule is, that the clerk is required, several days prior to the day of commencement of the monthly term, to make up a typewritten calendar of the cases which are then to be argued. Opposite each case is noted the time of argument, and the initials of the Judge who shall formulate the opinion in the case. Thus, the Judge has ample time before the arguments occur to examine the record, to familiarize himself with the issues involved, and thus is in position at the time of the argument of the case to bring out all the material points in the case.

Another rule is one that requires the clerk, after the arguments have been had on all the cases, to circulate to the Judges a list of all such cases. That list will also contain a list of any motions pending before the Court which are undecided, and, also, a list of the petitions for rehearing on any case previously decided.

After the Judges have formulated some, or all, of their opinions and circulated them, and at least after each conference, where some of the cases may be disposed of to the extent that three of the Judges will sign some opinions, and thus place them under the ten-day rule, the clerk circulates a revised list, which will not contain any case wholly disposed of, but only those which are not disposed of; and, in addition thereto, that list shows how many and what cases are under the ten-day rule, and which Judges have signed those cases which are under that rule, so that each Judge is thus, at least twice each week, advised of the condition of the cases before the Court for decision, and is in possession of all other information contained in that list. This all brings order and system into the work of the Court.

The adoption and observance of the foregoing rules has been the sole cause for the entire elimination of the law's delays, so far as this Court is concerned.

What has so far been said relates only to procedural rules governing the work and discharge of the duties of the Judges, after

cases have been properly appealed and submitted to this Court.

This Court, however, as other Appellate Courts, has prescribed definite rules of practice with reference to taking and perfecting appeals, which are, of course, in harmony with our statutory laws on the subject of appellate procedure. These rules do not greatly differ from those of Appellate Courts of other states and need no special mention, with the exception of one rule, which has done much to keep from coming before this Court many useless and needless motions, and has facilitated and accelerated appeals to it. We will first state the old rule.

"Any appeal in which the appellant shall not have served and filed his brief by the time the cause is reached for assignment for argument may be summarily dismissed or the decision appealed from affirmed, according as justice may require; and for failure of an appellant to serve and file his brief in time, or when the appellant shall not have served and filed his brief more than twenty days preceding the opening of the term, and such delay shall have inconvenienced opposing counsel, or needlessly delayed them in the preparation of the respondent's brief, this court will on a showing and application therefor, after notice, by respondent, place the cause at the foot of the calendar or impose such terms as may be just, or both. Delay by appellant in serving and filing briefs, until after the first day of the term, places the control of the cause on the calendar with the respondent. The respondent must serve and file his brief within thirty days after the service upon him of appellant's brief, and in any event at least ten days prior to the argument of the case; provided, that on notice and cause shown respondent's time for serving and filing his brief may be extended."

It is not difficult to comprehend, that, under that rule, there could be many motions arise, some to compel appellant to file his brief, some to dismiss the appeal, because his brief was not filed in time, others to compel him to file and serve his brief within a definite time, etc. And just as many motions would arise as to the service and

filing of the respondent's brief. In fact, hardly a week would pass in this Court, unless some such motion was made, and thereafter remain pending for determination.

About a year and a half ago, the writer hereof proposed to and had adopted by the Court (to supplant the old rule), the following rule:

"Upon appeal to the Supreme Court, the appellant shall fully prepare his brief and serve it upon the respondent, and file it with the clerk of the court from which the appeal is taken before or at the time the record of the case is transmitted to the Supreme Court, by the clerk of the District Court, and it shall be transmitted with such record.

"Within fifteen days after the service of the appellant's brief, upon the respondent, as aforesaid, the respondent shall prepare his brief, and serve it upon appellant, and file it with the clerk of the Supreme Court."

Since the adoption of this rule, if our memory serves us correctly, there has not been a motion before this Court, with reference to the making and filing of briefs by either the appellant or respondent in any case. This rule simply wiped out all such delay. It will be observed that, when the appeal is taken, and the record sent up, the appellant's brief must accompany it, so, as soon as the record arrives at the office of the clerk of the Supreme Court, he is in position to notify the parties that the case is ready to be heard. In fact, a case can and does go right on the next monthly calendar.

There are annually, approximately three hundred and fifty appeals to this Court. If the number of appeals annually were five hundred, this Court, under the reformed procedure above mentioned, could, nevertheless, entirely keep its work up to date, so, at the end of each month every case would be decided.

We are firmly convinced that all Appellate Courts in the United States could have their work likewise up to date if they would proceed under a similar system of

rules, governing the discharge of the duties of the members of the Court, if the Judges thereof will exercise the same degree of application to their work as do the members of the Supreme Court of North Dakota.

The bringing up of the work and the saving of a vast amount of money, which is otherwise lost by the delays of the law, are not the only benefits to be derived. The work of the Court, as a whole, will be of a higher degree of merit and perfection, for, in considering a case where the Court has all its work up, the case is fresh in their minds, as well as in the minds of the attorneys who argue the case. If an attorney appears before the Supreme Court to argue a case which has been pending therein for a period of one to two years—and we have understood there are states in which cases were pending in the Supreme Court for as long as three years before, in the regular order, argument could be had thereon—it is easy to see that, as a rule, the attorney's mind will be stale on the case. It has been pending so long that it is difficult for him to recall to his mind, clearly, the case as it was tried before the trial court. Hence, the argument, in such circumstances, is usually not very enlightening to the Appellate Court, and likewise it will get a very imperfect view of the case.

Another benefit which is gained by prompt and early decision of cases after appeal is that it does not delay justice, and, as is often the case, delay is denial of justice. A strong adversary may place a weaker one in such position with reference to property rights, he may hold him out of the enjoyment or acquisition of them, and may resist the payment of certain debts which he owes him, etc., by getting the benefit of delay in the Appellate Court, so that the latter, in sheer desperation, will submit rather than continue the unequal struggle; all of which perhaps would have been avoided if he could have

had a decision of the case within thirty days after the record reached the Appellate Court.

Another benefit is the prevention of appeals taken solely for delay. These, on the average, constitute from fifteen to twenty-five per cent of the appeals to an Appellate Court, where the Court is from a year to three years or more behind in its work. No appeals are taken for delay where it is certain the decision will be made within thirty days after the record is filed in the Appellate Court. And, in this connection, there is also a great saving to litigants.

The delays of the law, especially the delay of decision of cases in the Appellate Courts, are causing, we believe, a fair percentage of the people to lose confidence in, and respect for, the Courts. They are, to some extent, beginning, we believe, to feel, that the Courts are, to some degree, an instrumentality to be used by the strong to oppress the weak and to defeat them of their just rights. Quite a percentage are beginning to feel that there is not equality of right before the Courts; they are beginning to feel that they are not so sure that the Courts administer justice fairly and impartially, regardless of the wealth, prominence and power of one litigant, as compared with the poverty, obscurity and weakness of his adversary. If such should be the case the Courts themselves are largely to blame. And it is for them to eradicate the cause, if any, which brings about this condition.

It is the presumption, under our constitution and laws, that every litigant, no matter what his station in life may be, stands in a court of justice on a plane of equality with every other litigant who comes to the same Court. It is for the Courts to make that presumption a reality. It is for the Courts to brush aside the technicalities which are a curse and an impediment to the true administration of justice, and fairly, and without denial or delay, to measure the rights of all, whether of property or of person, by the same judicial yardstick, at

the same time giving due consideration to the frailties of mankind. It is for the Courts, when opportunity so offers, to restrain the hand of avarice and greed, that it may not impoverish the weaker one.

The greatest accomplishment that a judicial officer may have is the possession of a nature which demands that equity be done. Fortified with this as an element of his nature the true Judge will cause justice, as water, to seek its level. He will be deaf to the plaudits of the community, and inattentive to the waves of public opinion. And, regardless of these, will hold aloft the emblazoned banner of equal and exact justice to all.

The Judges of Appellate Courts should not always have their faces turned towards the past. In other words, should not always be guided in their decisions, figuratively speaking, by the hands of the dead. In this day and age, they should, a good part of the time at least, have their faces toward the future. The age in which we live is far different in many respects than that of fifty years, a century, or five centuries ago.

If a Judge of an Appellate Court of bygone ages has made a decision which enunciates a clear and unmistakable principle of good law, and the foundation thereof rests on principles of justice, the rule of *stare decisis* should be observed in deciding a case largely similar as to facts and in principle. But, if a decision was made a hundred years ago which states an unsound principle of law, and one whose foundation is unjust, an enlightened Judiciary should disregard it. For, if such decision is a mistake and an erroneous statement of the law, or enunciates an unsound principle, continued multiplication of the mistake and error can never cure the evil therein.

agree with the principles of law therein

We have heard of Judges who have written decisions where they did not themselves enunciated, and who would say, that, if the case were one of first impression, they would write their decision differently. but,

on account of a certain decision, or decisions, which have been followed for a hundred years, or two hundred years, they feel bound to follow them, and thus more firmly intrench the error. Such a Judge simply lacks courage. He forgets that the civilization in which he participates is far different to that which existed at the writing of the erroneous decision.

Past decisions founded in truth and justice are beacon lights to us of another generation, but those whose basis is error and injustice, are, figuratively speaking, an *ignis fatuus*, which lead both courts and litigants into an endless morass of uncertainty, and discontent.

Courts should not forget that they are the servants of the people, and that their principal duty is to determine fairly and impartially controversies of various kinds for them, and this in an orderly and progressive manner, seeking at all times to let their decisions rest upon principles of justice, equally applied to all litigants.

RICHARD H. GRACE.

Bismarck, N. D.

ROBBERY—INTOXICATING LIQUORS.

ARNER v. STATE.

197 Pac. 710.

(Criminal Court of Appeals of Oklahoma. February 12, 1921. Rehearing Denied May 10, 1921.)

Intoxicating liquor, possessing the inherent character of personal property, may be the subject-matter of robbery, irrespective of the purpose for which it is kept or used.

MATSON, J. This is an appeal from the district court of Jefferson county, wherein plaintiffs in error, John Arner and Elbert Sparkman, hereinafter designated defendants, were on the 18th day of September, 1918, adjudged guilty of the crime of conjoint robbery, and sentenced to serve a term of seven years each in the state penitentiary. From this judgment they have appealed to this court.

Several assignments of error are relied upon for a reversal of this judgment. The assignments that the court erred in overruling the motion for a new trial, in not sustaining the demurrer to the information, in not sustaining the motion of defendants for a directed verdict of not guilty, in refusing to give requested instruction No. 1, in giving instruction No. 8, and that the verdict is not supported by sufficient evidence, all relate to one general proposition of law, and are grouped together in the brief of counsel representing defendants. Under these assignments of error, it is contended that the crime of robbery may not be committed by the taking of whisky from a person at a time and place, and under such circumstances, as would render the person from whom the whisky was taken guilty of violating prohibitory liquor laws, even though it be considered that all the elements essential to constitute the crime of robbery were present in the taking of the whisky.

The information jointly charged defendants and two others with having robbed one Oscar Leming, in Jefferson county, of five cases of whisky, of which the said Leming was then possessed, the same being the personal property of said Leming, by force and violence, and by pointing a pistol and a Winchester rifle at the person of the said Oscar Leming.

The evidence disclosed that the said Leming was to deliver to some of these defendants the five cases of whisky for the sum and price of \$65 per case, and that, by previous arrangement, the said Leming was to meet some of these defendants at the point where the robbery took place, and that these defendants conspired together to rob the said Leming of said whisky by means of force and violence, and putting him in fear, in the manner and form as alleged in the information. The evidence further disclosed that the said Leming had conveyed said whisky to the said point in violation of the prohibitory liquor laws of this state.

Section 3620, Revised Laws 1910, provides: "There shall be no property rights of any kind whatsoever, in any liquors, vessels, appliances, fixtures, bars, furniture and implements kept or used for the purpose of violating any provisions of this chapter."

Other provisions of the prohibitory liquor laws make it an offense to manufacture, sell, barter, or give away intoxicating liquors within this state, and also to convey the same from point to point within the state, and also to have the same in possession with intent to violate any of the provisions of the act. It is apparent, therefore, that the prosecuting

witness was possessed of this intoxicating liquor in violation of the prohibitory liquor laws of this state.

The foregoing premises being conceded, counsel for these defendants strenuously contend that because the prosecuting witness under the statute had no property rights in the whisky of which he was admittedly robbed, that the crime of robbery was not committed; that if these defendants are guilty of any crime, it is of some other offense, such as pointing a weapon at another, which is a misdemeanor, and not of the felony of which they were convicted.

The argument advanced by counsel for defendants in support of these various assignments of error, and the contention made thereunder, is that, to constitute robbery there must be the taking of personal property from another by means of force or violence, and that the thing taken must be of some value. Therefore, it is contended that because the prosecuting witness had no property rights of any kind in the whisky of which he was possessed for the purpose of violating the prohibitory liquor laws, no property was taken from him, and therefore all the essential elements of the crime of robbery were not present in the taking of this whisky under the circumstances disclosed by the evidence.

We cannot agree with this contention. Section 3620, Revised Laws 1910, supra, does not have the effect of altering or changing the inherent character or nature of whisky as personal property. An entire consideration of the prohibitory liquor laws of this state discloses that the intent of the Legislature was to provide that intoxicating liquors possessed by a person for the purpose of violating any of the provisions of the prohibitory liquor laws should be contraband property as between the state, its officers, and such person; that a person unlawfully possessed of intoxicating liquors, etc., could not claim to have property rights in such articles in a proceeding brought by the state to confiscate them; not that the articles and things condemned, when unlawfully kept or used, were not property.

The conclusion is reached, therefore, that the pertinent inquiry is whether or not the chattel or thing taken is personal property, and not whether the possessor from whom it was taken was holding the same in violation of the laws of this state.

Independent of the question of whether Leming was unlawfully possessed of the whisky, the whisky itself had all the characteristics of personal property. It was personal prop-

erty, and as such was the subject of larceny and of robbery, whether possessed lawfully or unlawfully, and this is true although the state, through its lawfully constituted officers, could seize (and destroy the same) from one unlawfully possessing it.

That said property was of some value is clearly disclosed by the evidence. In fact, no contention is made that the whisky taken was without value. Counsel rely solely, to sustain their contention, upon the proposition that the prosecuting witness had no property rights in it.

It is not the policy of the law to encourage culpable defenses to criminal actions. It is the duty of this court to so construe the criminal laws of this state as to effectuate their purposes and give force and effect to the evident legislative intent. It is the business of the state, through its duly constituted peace officers, to bring such action as the law prescribes against contraband property and its users, and it is not the privilege of highwaymen to hold up at the point of a gun the possessors of contraband property and take it away from them by force, nor did the Legislature so intend by merely providing that such possessor should have no property rights in the property when unlawfully kept. Ample provision of law is made for the confiscation and taking of such contraband personal property, and it must be taken in the manner prescribed.

The contention of counsel for defendants confound matters necessary to be distinguished. The effect of their contention is to urge the right of the state to extinguish property rights in contraband things, such as whisky, as a defense to criminal conduct resorted to by them to obtain possession of the contraband property, with intent to make the same unlawful use of it against the state which they assert as a defense to its taking. The fallacy of this contention is apparent—a lawful right of the sovereign people is urged to sustain the unlawful conduct of the individual. The right of the state to seize and confiscate intoxicating liquor, when unlawfully possessed, through proper court action, does not include the right of the individual to confiscate such property at the point of a gun.

The alleged error of the trial court in refusing to give a requested instruction is without merit. An examination of the instructions given discloses that the substance of the matter contained in the requested instruction was covered in the general charge. The follow-

ing instruction was given, over the exception of defendants:

"The fact that the property taken was whisky, and was unlawfully in the possession of Oscar Leming, and was being transported by him in violation of the law of this state, does not make the act of robbery, if it was committed, any less a crime."

It necessarily follows from that heretofore stated to be the law of this case that the giving of the foregoing instruction was not error.

For reasons stated, the judgment is affirmed.

NOTE.—Unlawfully Possessed Intoxicating Liquor as Subject of Theft.—In the case of *Tom Thomas v. State*, 13 Okl. Cr. 414, 164 Pac. 995, which was a conviction for the crime of murder committed by defendant while engaged in the perpetration of a whisky robbery, the contention was made that defendant was not guilty of the crime of murder committed in the perpetration of a robbery, because whisky used in violation of the law was not the subject of robbery. In passing upon this contention, this court, in the body of the opinion said:

"The contention that because whisky is contraband property in this state, as against the state and its officers, others are entitled to rob and murder * * * to obtain possession of it from one who is using it unlawfully, is wholly without merit. Neither robbery nor murder may be justified or excused on such a ground."

In *Mance v. State*, 5 Ga. App. 229, 62 S. E. 1053, it is held:

"Intoxicating liquor may be the subject-matter of larceny, though it is not the subject-matter of lawful sale."

In *Osborne v. State*, 115 Tenn. 717, 719, 92 S. W. 853, 5 Ann. Cas. 797, it is held to be 'well settled that a chattel kept for an unlawful purpose, such as intoxicating liquors kept for sale in violation of law, or gambling paraphernalia, the possession of which is prohibited, may be the subject of larceny.'

In *Smith v. State*, 187 Ind. 253, 118 N. E. 954, L. R. A. 1918D, 688, it is held:

"Although property is illegally held and used for gambling purposes, in violation of Burns' Ann. St. § 2474, it is nevertheless a subject of larceny."

One of the leading cases on this subject is *Commonwealth v. Rourke*, 10 Cush. (Mass.) 397, 399. In that case it was said: "The law punishes larceny because it is larceny; and therefore one may be convicted of theft, though he do but steal his own property from himself or his bailee. 7 H. VI 43a; 3 Co. Inst. 110. And the law punishes the larceny of property, * * * because of its own inherent legal rights as property; and therefore even he who larcenously takes the stolen object from a thief whose hands have but just closed upon it may himself be convicted therefor in spite of the criminality of the possession of his immediate predecessor in crime. Of the alternative moral and social evils, which is the greater, to deprive property unlawfully acquired of all protection as such, and thus to discourage unlawful acquisition, but encourage larceny, or to punish, and so discourage larceny,

though at the possible risk of thus omitting so far forth to discourage unlawful acquisition? The balance of public policy, if we thus attempt to estimate the relative weight of alternative evils, requires, it seems to us, that the larceny should be punished."

It has been held that larceny of gaming checks can be committed, although gaming is illegal (*Bales v. State*, 3 W. Va. 685), and that it is no defense to an indictment for stealing intoxicating liquors that the liquors stolen were kept for sale in violation of law (*State v. May*, 20 Iowa, 305; *State v. Sego*, 161 Iowa, 71, 140 N. W. 802; *August v. State*, 11 Ga. App. 798, 76 S. E. 164).

One who loses his money in a gambling game and surrenders it to his adversary, may be guilty of robbery in regaining it by force, but if he was induced to part with it through deceit or fraud, he would not be guilty, as one obtaining property by false pretenses is guilty of theft. *Temple v. State*, Tex. Cr. App., 215 S. W. 965.

ITEMS OF PROFESSIONAL INTEREST.

A TRIBUTE TO MR. W. A. BLOUNT.

In the closing days of his year's service as president of the American Bar Association, William A. Blount, of Pensacola, Florida, died last Wednesday, at the Johns Hopkins Hospital, Baltimore, Maryland. Well known in Minnesota by those lawyers of this state who had the privilege of contact with him during his many years of service with the American Bar Association, Mr. Blount was a representative American lawyer. His death deprives the American Bar of a member of the highest standing in character and efficiency.

He prepared for his profession at the University of Georgia, where he graduated with the highest honors, both in the Bachelor of Arts course and in law. In his own state of Florida he was pre-eminently the leader of the bar. He was a member of the Florida Constitutional Convention of 1885, and chairman of many state commissions from time to time to revise the statutes of his state and to simplify the system of pleading and practice in Florida courts.

He was for years a Florida member of the National Conference of Commissioners on Uniform State Laws and was responsible, perhaps more than any other one lawyer, for the preparation and adoption by the various states of uniform state legislation upon commercial and other subjects, and thereby the elimination of unnecessary conflict of laws as to rights or remedies in business and other matters which

involve interstate relations. He attained a deserved leadership in the deliberations of the American Bar Association and of the National Conference of Commissioners on Uniform State Laws, of which latter he was president during the two years preceding his election, in 1920, as president of the American Bar Association.

While Mr. Blount's success in his profession gave him pre-eminence as a practitioner, his great accomplishments were through his constructive work in connection with the building up of the legal systems of his own state and of the nation.

In both phases of his activities he was always a thorough student and showed up at the critical moment with the utmost preparation. He presented his points with such clearness and incisiveness of statement and in such logical form as to compel conviction. He was always considerate of the opinion of others and judicial in his approach to and consideration of any subject. He was a high-class Southern gentleman, genial, lovable, a loyal friend and inspired in others the utmost friendship and respect.

The news of his sudden death, in this, the seventieth year of his life, will be a great shock to thousands of American lawyers who had the privilege of his acquaintance.—ROME G. BROWN in the *Minneapolis Tribune*.

SUPPLEMENTARY ANNOUNCEMENT OF THE AMERICAN BAR ASSOCIATION MEETING.

Former President William H. Taft will act as toastmaster at the annual dinner of the American Bar Association, to be held in Cincinnati in connection with the convention of the organization from August 30 to September 2. Mr. Taft's acceptance of the invitation to preside at the dinner, which will be held at the Hotel Gibson on the evening of September 2, was received on Monday by Province M. Pogue, Chairman of the Executive Committee, having charge of the arrangements for the convention.

There will be a number of other noted speakers at this dinner, among them Rt. Hon. Sir John Simon, of London, former Secretary of State for Home Affairs of England; Hon. John W. Davis, ex-Ambassador to Great Britain; ex-United States Senator Charles S. Thomas, of Colorado; Hon. Elihu Root; Hon. Harry M. Daugherty, United States Attorney General; Senators Atlee Pomerene and Frank Willis, several foreign ambassadors and probably President Harding, who will endeavor to ar-

range his affairs so that he may attend the convention.

It was announced Monday that through the recent death of Hon. William A. Blount, President of the American Bar Association, Mr. Hampton L. Carson, of Philadelphia, Chairman of the Executive Committee of the Association, would automatically become president of the organization until such time as a successor to the presidency was elected.

In honor of the late Judge John W. Warrington, who had been appointed Honorary Chairman of the Reception Committee for the convention, it has been decided by the Executive Committee to continue his name at the head of this committee, no appointment of a successor being made. Mayor Galvin, who was appointed chairman of the Reception Committee, will have as his assistants many of the leading barristers of the middle west, including seven members of the Supreme Court of the State of Ohio.

BOOK REVIEW.

BOGERT ON TRUSTS.

A new general treatise on the subject of trusts has just appeared from the pen of Mr. George C. Bogert, Professor of Law in the Cornell University College of Law. It is a handbook primarily intended for students, but so thorough is the author in his discussion of the origin and history of the principles of the law of trusts that lawyers will find in its pages convenient starting points from which to begin their researches into more complicated questions of the law of trusts.

The author has made a few changes in the customary classification of the law of trusts, these changes being made mainly with a view to classify the material under headings "which represent the principal, practical problems arising in the administration of trusts." The author's classification is as follows:

Chapter I, Introduction and History; II, Distinction Between Trusts and Other Relations; III, Creation of Express Trusts; IV, Creation of Resulting Trusts; V, Creation of Constructive Trusts; VI, The Trust Purpose—Private Trusts; VII, The Trust Purpose—Charitable Trusts; VIII, The Settlor; IX, The Subject Matter; X, The Trustee: His Qualifications, Appointment and Removal; XI, The Powers of the Trustee; XII, The Duties of the Trustee; XIII, The Interest of the Cestui Que Trust—Its

Nature and Incidents; XIV, The Remedies of the Cestui Que Trust—How Enforced or Barred; XV, The Termination of the Trust.

It would be wrong to regard this book as a mere students' handbook. A work which discusses and classifies over seven thousand cases will necessarily have much value to lawyers.

Printed in one volume of 675 pages and bound in buckram.

HUMOR OF THE LAW.

When Jones' rich grandmother passed away, all his poverty-stricken friends rallied about him with words of cheer and comfort; but Jones remained sad and dejected.

"She left a last will and testament, I suppose?" murmured Jenkins carelessly.

"Oh, yes," said Jones, "she left a will and testament."

They hung expectant while sobs choked back his words.

"I," he declared at last, "am to have the testament."—*Jack Canuck (Toronto).*

William Ryan is the only man in a New York town who says that he understands Einstein's theory of relativity. Ryan states that after reading the book carefully three times he had a dream or a revelation, during which the earth had left him and he was treading air inside a sphere, the walls of which were invisible. He further explains:

"The conglomeration of cosmos apparently retarded the continuity of motion, and the distance decreased depressingly as the altitude reached the zenith, near the apex. While the electro-dynamics are in evidence at short periods, the rays of the radio decline in ratio with the apparent lengthening of the declination. To simplify the problem, let G equal the length of the declined ray; let I equal the altitude, plus the base; and add N, the result being a transparent concoction of juniper, used for many years by the scientists before Prof. Pussyfoot propounded the problem of prohibition."

The police asked Ryan where he got it, and now he's arrested, but still talking of relativity.—*St. Louis Post-Dispatch.*

"Yes," said the man who was proud of his library, "whenever I find one of my books with a torn leaf I put it through a legal process."

"What legal process?" his visitor asked.

"I have it bound over to keep the piece."—*Boston Transcript.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Animals**—Dipping Cattle.—Acts 36th Leg. (1920), Third Called Sess. c. 38, § 15, authorizing the Live Stock Sanitary Commission to require the dipping of cattle exposed to fever-carrying tick within nine months prior to the passage of the act, and making violation of such direction a misdemeanor, is not an *ex post facto* law.—Walker v. State, Tex., 229 S. W. 513.

2. **Attorney and Client**—Authority of Attorney.—Except in an emergency, there is no authority in an attorney to enter a stipulation to settle and compromise a cause of action without the knowledge or consent of his client.—Matteson v. Blaisdell, Minn., 182 N. W. 442.

3.—**Knowledge of Attorney**—Knowledge acquired by an attorney prior to his employment by a client could not be imputed to the client.—Ives v. Culton, Tex., 229 S. W. 321.

4.—**Unpatriotic Conduct**—Acts committed and opinions expressed by an attorney of this court during the war which were not in accord with the standard of patriotism set by the Bar Association and observed by the average citizen theless did not amount to treason, nor to a violation of the espionage law then in force, or of any federal or state statute, nor to a violation of the oath and duties of an attorney, as prescribed by the statutes and the decisions and rules of this court, do not constitute legal ground for disbarment or suspension.—In re Clifton, Idaho, 196 Pac. 670.

5. **Bankruptcy**—Action by Creditor.—That a creditor has in good faith attached his debtor's property within four months does not disqualify him from presenting or joining in a petition to have the debtor adjudicated a bankrupt, although the attachment has not been formally

released, but the court may require the attachment lien to be vacated before an adjudication is entered.—In re Automatic Typewriter & Service Co., U. S. C. C. A., 271 Fed. 1.

6.—**Farming**—Under Bankruptcy Act, § 46, an act committed by a person who was at the time engaged chiefly in farming cannot be charged as an act of bankruptcy and made the basis of involuntary proceedings.—In re Doroski, U. S. D. C., 271 Fed. 8.

7. **Banks and Banking**—Duty of Commissioner.—The statute making it the duty of the bank commissioner to take charge of a bank immediately upon a showing of insolvency, or of a willful violation of the banking act by its officers, does not require the closing of the bank under such circumstances, nor does it deprive the commissioner of his discretionary power to take such steps to meet a particular situation as may be called for by the circumstances.—State v. Wilson, Kan., 196 Pac. 759.

8.—**Joint Bank Deposits**—Comp. Laws 1915, § 8040, relative to joint bank deposits payable to the survivor, is valid, and in the absence of competent evidence to the contrary the presumption created is sufficient to establish title to the deposit in the survivor.—In re Taylor's Estate, Mich., 182 N. W. 101.

9. **Bills and Notes**—Failure of Consideration.—In action against drawer of a check indorsed by payee to plaintiff, it was not error to refuse to compel plaintiff to make the payee as indorser a party defendant to the action.—Murphree v. Wrens Motor Co., Ga., 106 S. E. 741.

10.—**Stipulation**—Where a note contained a stipulation that under certain contingencies it should be surrendered to the maker without payment, the payee cannot avoid the provision on the theory that it did not sign the same.—Cooper Grocery Co. v. H. T. Hammick & Co., Tex., 229 S. W. 356.

11.—**Transfer**—Transferee of negotiable notes who takes note by method of transfer other than indorsement under the statutes and law merchant takes note subject to the rules that govern the transfer of non-negotiable paper.—Jones County Trust & Savings Bank v. Kurt, Iowa, 182 N. W. 409.

12. **Brokers**—Commission.—If a sale is made by the owner on more liberal terms to a buyer produced by the broker, the broker is not entitled to recover where the sale was not made by the owner until the broker's efforts, after fair opportunity and without fault of the owner, had come to naught.—Wilcoxson v. Suddeth, Tex., 229 S. W. 352.

13.—**Unilateral Contract**—In an action on a contract giving plaintiff an exclusive agency to sell defendant's real estate signed only by defendant, a petition alleging that defendant procured a purchaser ready, able and willing to buy, and who actually offered to buy, held not subject to demurrer on the ground that the contract alleged was unilateral.—Porter v. Forsyth, Ga., 106 S. E. 746.

14. **Canals**—Village a "Person."—Under Canal Law, § 47, giving "every person" sustaining damages from canals the right to recover damages in proceeding before the Court of Claims, a village could recover for damage to sewer system and sewage disposal plant sustained in the construction, maintenance, and operation of

a canal; the village being a "person" within the statute, in view of General Construction Law, § 37, and General Municipal Law, § 2.—*Village of Seneca Falls v. State*, N. Y., 187 N. Y. S. 409.

15. **Carriers of Goods—Conversion of Shipment.**—In an action for the conversion of an interstate shipment of lumber brought, not against the initial carrier, but for a conversion alleged to have occurred after the transportation had been completed and the consignee had redelivered the lumber to be carried on another contract, the state rule that the measure of damages is the value of the property at the time and place of conversion was properly applied.—*Buschow Lumber Co. v. Hines*, Mo., 229 S. W. 451.

16. **Carriers of Live Stock—Suitable Cars.**—It is the duty of a carrier to furnish suitable cars in which to transport a shipment of cattle, and he cannot escape liability for failure to perform that duty, because the shipping contract required the shipper to bed, inspect and accept the cars.—*Mexico Northwestern Ry. Co. v. William*, Tex., 229 S. W. 476.

17. **Carriers of Passengers—Proximate Cause of Death.**—Where a subway passenger, after suffering an injury resulting in the bruising of her body, died of pneumonia, it must be shown that the injury was the proximate cause of the death in order to recover; that is, that there was an unbroken connection between the wrongful act and the injury, and though it is not necessary to show that the injury was the only cause of death, to establish that it was the proximate cause, it must be shown that it set in motion other causes which produced the disease and death.—*Santolo v. Interborough Rapid Transit Co.*, N. Y., 187 N. Y. S. 390.

18. **Constitutional Law—Due Process.**—There is no lack of due process because Code Supplemental Supp. 1915, § 1989a8, does not provide for notice to property owners, as well as contractors, of letting of contract for drainage improvement; the notices to them of the proceedings for establishment of the district and of levy of assessment for the expense, otherwise provided for, being sufficient.—*Horton Tp. v. Drainage Dist. No. 26*, Iowa, 182 N. W. 395.

19. **Impairment of Contract.**—The state, acting through its reserved police power, which was largely delegated to the Public Service Commissions, under the Public Service Commissions Law, may change the franchise rates accepted by a gas company without violating the constitutional inhibition against impairment of contracts, for contracts relating to public utilities are made ordinarily in contemplation that the state possesses power to regulate such rates.—*Village of Warsaw v. Pavilion Nat. Gas Co.*, N. Y., 187 N. Y. S. 351.

20. **Corporations—Liability of Stockholder.**—Whatever remedy defendant stockholder might have had before appointment of receiver for her company, in an action brought by the receiver for the benefit of creditors to recover the difference between the par value of her stock and what she actually paid for it, the receiver suing pursuant to decree of the appointing District Court of the United States for the District of Connecticut, the stockholder cannot avoid the liability created by the Connecticut statutes by setting up the fraud of the corporation.—*Butterworth v. Ross*, Mass., 130 N. E. 678.

21. **Deeds—Condition in Restraint.**—Where, on the death of defendant's wife, her children by a prior marriage conveyed to him a life estate in two-thirds of a parcel of land on condition that the estate should terminate in event of his remarriage, the condition, though in restraint of marriage, is valid; the marriage being a second one, and the law upholding the validity of such a condition both as to men as well as to women.—*Stauffer v. Kessler, Ind.*, 130 N. E. 651.

22. **Divorce—Default Judgment.**—Where, after obtaining a judgment of divorce by default, the plaintiff wife remarried, the defendant husband's motion to open the default will not be granted, unless it is apparent that he was acting from good motives, and not from any expected personal advantage.—*Bandler v. Bandler*, N. Y., 187 N. Y. S. 358.

23. **Evidence of Disease.**—The mere possession by husband suing for divorce of mixtures used as remedies for a venereal disease was not sufficient in itself to establish that he had such disease, though worthy of consideration in connection with other facts.—*Wade v. Wade*, Mo., 227 S. W. 432.

24. **Habitual Drunkenness.**—Habitual drunkenness, within the meaning of the statute, may exist, although the party charged may remain sober during business hours.—*Matheny v. Matheny*, Iowa, 182 N. W. 375.

25. **Estoppel.**—In *Pais*.—Where plaintiff delegated her sister to open an account with defendant building and loan association, and further entrusted to the sister payments of cash made on her subscription for shares, so that the sister was enabled to present plaintiff's passbook and obtain \$350 from the association charged to plaintiff's account without plaintiff's knowledge, the sister giving her name as that of plaintiff, under the rule that, when one of two innocent parties must suffer, the loss must fall upon him who reposed confidence, and thereby made the loss possible, plaintiff is estopped in *Pais* from invoking liability against the association for the amount withdrawn.—*Wysockowski v. Polish-American Building & Loan Ass'n of City of Newark*, N. J., 113 Atl. 246.

26. **Fixtures—Machinery.**—Where machinery was sold to a mortgagor under an agreement that it should remain personalty and should be subject to a chattel mortgage for payment, the intention of the seller and mortgagor will control, and the machinery being such that it could be removed without damage to the realty, it did not become part of the realty under the doctrine of fixtures.—*Murray v. Simmons*, Tex., 229 S. W. 461.

27. **Frauds, Statute of—Description of Land.**—A contract of sale of land contains a sufficient description to satisfy the statute where it contains the street number of the property.—*Baller v. Spivack*, Mich., 182 N. W. 70.

28. **Destruction of Deed.**—Though a grantee in a deed duly executed and delivered cannot reconvey the title to his grantors to enable them to convey it to another by returning to them for destruction the deed before it had been recorded, his consent to the destruction of the deed, in view of the statute, prevents proof of its contents by parol, and therefore he cannot establish his title as against the subsequent grantee.—*Kempf v. Michelbach*, Wash., 196 Pac. 661.

29. **Redemption.**—An agreement by a third mortgagee to buy in the property at a sale under his mortgage and allow the owner of the equity a reasonable time to redeem is not within the statute, and is enforceable in equity.—*Wright v. Cobb*, Mo., 229 S. W. 171.

30. **Gifts—"Undue Influence."**—The "undue influence" which is objectionable in the eye of the law and justifies setting aside a gift must be tantamount to force or fear; the influence

of affection, attachment, or gratitude not being sufficient to avoid the gift.—*Barron v. Reardon*, Md., 113 Atl. 283.

31. **Insurance—Addition to Building.**—A silo located 2 feet from a barn and structurally connected therewith is an "addition," within the meaning of a clause in a tornado policy reading, "\$500 on frame, metal roof barn and sheds occupied as a cow barn, including foundations and additions," the silo being connected with the barn by a covered chute 4 feet wide and 10 feet high, and the roof of the barn being attached to the silo, and the silage being thrown from the silo to a truck located in the chute and thence conveyed to the cows occupying stalls on either side of the barn.—*Henry Clay Fire Ins. Co. v. Crider*, Ky., 229 S. W. 128.

32. **Cause of Injury.**—Where an insurance policy provides that the insurance is against "injury effected solely through external, violent, and accidental means," the plaintiff or complainant must prove to a reasonable certainty that the death or injury was so caused. It is not sufficient to prove a declaration made by the deceased to his physician that his injury was so caused. There must be affirmative proof as to how the injury occurred, and the proof must show it was accidental and caused through accidental means.—*United States Casualty Co. of New York v. Malone*, Miss., 87 So. 896.

33. **Renewal.**—Where the insurer who had notified the agent that the original policy would be renewed, on receiving a premium and an application for a different policy transmitted a second accident policy, the fact that the insurer retained such premium will not estop it from denying that there was no renewal of the original policy, though the new policy was never delivered, where the original action by the beneficiary was on the second policy, and, having been defeated in that, she sought to recover on the theory of the renewal.—*Wright v. Great Eastern Casualty Co., Mo.*, 229 S. W. 440.

34. **Vexatious Refusal.**—A vexatious refusal of an insurer to pay a loss under Rev. St. 1919, § 6337, is not to be deduced from the fact alone that the verdict is adverse to defendant.—*Miller v. Firemen's Ins. Co., Mo.*, 229 S. W. 261.

35. **Intoxicating Liquors—Search Warrant.**—Const. art. 2, § 10, providing that no search warrant shall issue without probable cause supported by oath or affirmation, requires that the magistrate must be satisfied that there is reasonable or probable cause, and is violated by Pub. Acts 1917, No. 338, § 25, making it mandatory for the magistrate to issue a warrant to search for intoxicating liquors on presentation of the sworn complaint or affidavit therein prescribed.—*People v. Delamater*, Mich., 182 N. W. 57.

36. **Seizure of Automobile.**—The seizure of an automobile because unlawfully used in the transportation of liquors under Act 1919, p. 6 et seq., is a proceeding in rem, and the statute must be strictly followed, and a proceeding to enforce forfeiture cannot be properly instituted until after the property incupated is seized by the executive authority; previous seizure being necessary to legal process.—*In re One Ford Automobile*, Ala., 87 So. 842.

37. **Landlord and Tenant—Holding Over.**—A tenant holding over after expiration of his term is deemed in law to hold over as tenant at the same rent he has previously paid, if no new agreement is made; but if he has notice from the landlord that, if he retains possession, he must pay a higher rent, specified as to amount, and he remains in possession, he must be deemed to have assented to the increased rent.—*Machson v. Katz*, N. Y., 187 N. Y. S. 411.

38. **Right of Action.**—Plaintiff landlord was not required to demand payment of the rent at the time it became due and payable as a condition to his right to sue for its recovery; nor, under G. L. c. 186, § 12, was he required to make such demand as a condition to his right to determine the tenancy at will upon the failure, neglect, or refusal of defendant tenant to pay the rent when it fell due.—*Dowd v. Lawlor*, Mass., 130 N. E. 674.

39. **Term of Years.**—A term for five years was not canceled and superseded by a tenancy from month to month by receipts for monthly rent reciting a monthly tenancy, where the lessee took possession prior to the execution

of the term lease, receiving one such receipt before such execution and receiving several afterwards; the receipts being on a printed form and treated by the parties as mere receipts.—*Owen v. Frey, Ind.*, 130 N. E. 656.

40. **Maritime Liens—Repairs.**—A repairer of a scow on order of a charterer, under a charter requiring return of the boat in good order and condition, ordinary wear and tear excepted, who by direction of a representative of the owner made additional repairs to parts injured or worn through ordinary wear and tear, and which were not within his contract with the charterer, held entitled to a lien therefor under Act June 23, 1910 (Comp. St. §§ 7783-7787).—*The No. 14*, U. S. D. C., 271 Fed. 10.

41. **Supplies Furnished to Owner.**—One furnishing gasoline to a motor boat on orders of the captain, pursuant to an established course of business, under which the bills had been paid periodically by the owner, held entitled to a maritime lien under Act June 23, 1910.—*The Norsman*, U. S. D. C., 271 Fed. 15.

42. **Master and Servant—Assault by Another Servant.**—When applicability of the federal Employers' Liability Act is involved, or it is to be determined in a suit whether it is applicable or not, it may generally be determined by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as, practically, to be a part of it. The facts in this case do not bring it within this rule as the cars being switched neither carried interstate commerce nor were they to be used immediately in interstate commerce, nor had they been used immediately before in such commerce, but were only used therein whenever the exigencies of the railroad called them into service for that purpose.—*Hines v. Green*, Miss., 87 So. 649.

43. **Assumption of Risk.**—Where plaintiff, a railroad employee, engaged in making secure logs piled on a car, was injured by the fall of a log which with others had been jacked up, it was not incumbent on plaintiff to prove the exact reason why the log fell at that particular time, for the evidence relates to a fact which lies in the realm of physics.—*Hines v. Drager, Ind.*, 130 N. E. 654.

44. **Corporate Officer—Under Workmen's Compensation Act** defining "employees," and article 5246—83, providing that the officers and directors of a corporation are not deemed employees, a stockholder, who was the general manager, director, secretary and treasurer of the employer corporation for a monthly "salary," is not entitled to compensation, though, as part of his duties as general manager, he occasionally performed the work of a laborer in the plant, and was injured while so doing, the language of the state, which used the word "wages," signifying compensation for mechanical or menial labor, and not the word "salary," which has reference to employment above the grade of such labor, showing an intention to exclude corporate officers even before the amendment of 1917.—*Millers' Indemnity Underwriters v. Cook*, Tex., 229 S. W. 598.

45. **Course of Employment.**—An employee engaged in sorting bales of cotton and hoisting them from the basement upstairs through a trapdoor by means of a rope running over a pulley and attached to an engine, who was injured while going upstairs by means of the rope, was not injured in an accident arising out of and in the course of the employment within the Workmen's Compensation Act, where there was a stairway provided for employees going upstairs, and there was a rule that no man should go up the rope, of which the employee had knowledge, although he was going to the upper floor to attend to matters for the master.—*Fournier's Case*, Me., 113 Atl. 270.

46. **Negligence.**—In a servant's action for injuries when his hand was caught in a machine, evidence that the machine was started by the action of the foreman in leaning forward to reach a wrench whereby he was to effect a repair shows that he acted in his capacity as foreman, so as to render the employer liable.—*Hancox v. Craddock-Terry Co., Mo.*, 229 S. W. 271.

47. **Soldier Working for Logging Company "Workman."**—One drafted into the army and sent as a member of a military company to work with civilian employees of a logging com-

pany operating for the government is not in involuntary servitude so as to be without the protection of Workmen's Compensation Act, but he is a "workman" as defined by section 3, it being the intention of the Legislature to protect every one engaged in extrahazardous work, whether he be soldier or civilian.—*Rector v. Cherry Valley Timber Co.*, Wash., 196 Pac. 653.

48. **Mines and Minerals—Negligence.**—Acts 1911, p. 514, § 38, requiring mine operators to furnish props, does not deal with the relation of master and servant, or with the subject of mining coal, and in a personal injury action for noncompliance with the act it is not essential that plaintiff aver and prove that he was an employe of defendant operator.—*Corona Coal & Iron Co. v. Spann*, Ala., 87 So. 827.

49. **Municipal Corporations—Due Care.**—It is the duty of a city to take due care that awnings over the sidewalk and the posts supporting them are so constructed and maintained that in their ordinary, usual or customary uses they would not injure pedestrians properly passing along the sidewalk.—*City of Tallahassee v. Hawes*, Fla., 87 So. 765.

50. **Negligence.**—Whether defendant's employe was negligent in permitting bales of cotton to fall from his dray on a street, or in permitting them to remain there an undue and unreasonable length of time, whether such bales showing white splotches were calculated to frighten an ordinary roadworthy horse, and whether such negligence constituted the proximate cause of the horse shying and running into an automobile, were questions for the jury.—*Hardwick v. Figgers*, Ga., 106 S. E. 738.

51. **Negligence in City Hospital.**—No action can be maintained against a city for injuries received from falling into the elevator shaft in the city hospital negligently left unguarded; the maintaining of such a hospital being an exercise of the city's police power, a governmental function.—*Scott v. City of Indianapolis*, Ind., 130 N. E. 658.

52. **Paving Assessment.**—Where all that part of a pavement for the expense of which plaintiff property owners were assessed had been furnished and their property had been found to be especially benefited in the sum assessed, the fact that the street railway company had not laid that part of the pavement of the street which it was required by law to lay did not make the assessment void or illegal.—*Johnston v. City of Hartford*, Conn., 113 Atl. 273.

53. **Validity of Statute.**—*Buffalo City Charter*, § 264, subd. 3, permitting the council to grant pensions to widows of deceased members of the police force and to annuitants under the police life insurance fund or police pension fund, where death or retirement occurred prior to its passage, is unconstitutional and void, violating Const. art. 3, § 28, and article 8, § 10, relating to extra compensation to public officers and to the giving of money to individuals, etc.—*Glasser v. City of Buffalo*, N. Y., 187 N. Y. S. 337.

54. **Partnership—Existence of.**—In action to recover 200 bushels of peanuts as one-half the toll taken for use of a peanut thrasher, evidence that plaintiff owned the thrasher and agreed with defendant to furnish it and keep it in repair, defendant to operate it, furnishing the labor therefor, each paying for half the oil and gasoline used, and the peanuts taken as toll to be divided equally, and that plaintiff did not contemplate a partnership, but intended his half of the toll peanuts to be rent for the use of the machine, did not make it appear that the parties should share losses equally, and hence there was not, as a matter of law, a partnership, which would prevent plaintiff's maintaining the action.—*Smith v. Murphree*, Ala., 87 So. 795.

55. **Principal and Agent—Use of Trade Name by Agent.**—Where plaintiff lent money to the agent of the owner of a garage, and when garnishee defendant entered into negotiations for the purchase the owner denied any liability and refused to list the debt as one of her own under the Bulk Sales Law, and the garnishee defendant allowed plaintiff time to proceed against the owner, held that, notwithstanding plaintiff asserted that the agent had represented that he purchased the garage and that the loan was to enable him to purchase oil, and it appeared that the check therefor had been in-

dorsed in the trade-name under which the garage was conducted, the garnishee defendant is not liable.—*Wooley v. Chandler*, Wash., 196 Pac. 643.

56. **Railroads—Defective Car.**—Where a board had been nailed across the door of a freight car to prevent door from falling by reason of the decayed condition of the supports, and the defendant railroad, which received the car from a connecting carrier, did not notify the consignee's employee of the latent danger, defendant was liable to the employee for injuries sustained when the door fell upon him by reason of such defect.—*Griffin v. Payne*, N. J., 113 Atl. 247.

57. **Fencing Right of Way.**—Code 1907, § 5654, requiring railroad to build fences and cattle guards on notice by the Public Service Commission, is a valid exercise of the police power of the state, and does not violate the provisions of the Constitution guaranteeing due process of law and the equal protection of the law.—*Ex Parte Hines*, Ala., 87 So. 691.

58. **Release—Condition.**—If the money received by injured employee at the time of the execution of a release was given to him as a gift, so that there was no consideration for the release, the employee was not required to restore the money, as a condition to his avoidance of release.—*Illinois Cent. R. Co. v. Johnston*, Ala., 87 So. 866.

59. **Settlement for Personal Injuries.**—A release signed by libellant on receipt of a lump sum in settlement of a claim for personal injuries, after payments made to him under the State Workmen's Compensation Law had ceased, because of the decision of the Supreme Court that such law was not applicable to such cases, held to have been executed with full understanding of the situation and to bar a suit for further compensation.—*De Lisi v. Booth & Co.*, U. S. D. C., 271 Fed. 47.

60. **Taxation.**—"Incorporeal Hereditaments."—Mining leases of real property located in Minnesota and unaccrued installments of rents to grow due on each of the leases were "incorporeal hereditaments" and part of the real estate not subject to taxation in Michigan.—*City of Saginaw v. Second Nat. Bank*, Mich., 182 N. W. 88.

61. **Personalty of Bankrupt.**—Personal property of a bankrupt, in the possession of a trustee in bankruptcy, is liable to taxation in the taxing district where such property is "found" on the date fixed by law for assessment of taxes; and this includes money deposited in bank.—*Tennant v. State Board of Taxes and Assessments*, N. J., 113 Atl. 254.

62. **Sales—Possession.**—Both under the common law and under Personal Property Law, § 144 subds. 1, 2, 3, the vendor, at his election in all cases where the title to the property has passed, can sue and recover the contract price, even though he retain the actual physical possession of the property, in which case he holds as trustee for the buyer.—*Turner-Looker Co. v. Aprile*, N. Y., 187 N. Y. S. 867.

63. **Statutes.**—Construction of.—Where the provisions of the Workmen's Compensation Acts of other states had been construed with practical unanimity, the Legislature is presumed to have enacted the Compensation Act containing similar provisions with the intention that it should receive the settled judicial construction given it by the other states, though the question had not been decided in the state from which the act was mainly taken.—*Steagall v. Sloss-Sheffield Steel & Iron Co.*, Ala., 87 So. 787.

64. **Vendor and Purchaser—Action for Installment.**—The vendor's bringing of an action for an installment less than the whole price does not operate as an election to affirm the contract precluding him from claiming the property.—*River Farms Co. v. Borges*, Cal., 196 Pac. 784.

65. **Wills—Intent.**—Where testator in one part of his will used the phrase "my estate" as including certain trust property over which he had power of appointment by his father's will, the rule of construction was applicable that where a word is used in one sense in one part of a will, and there is nothing to indicate a different meaning when the same word is used in another part, it may be presumed that the same meaning was intended.—*Ames v. Ames*, Mass., 130 N. E. 681.

Central Law Journal.

St. Louis, Mo., July 29, 1921.

WOMEN AS JURORS.

Reforms which solve one problem often create many others equally difficult. Of this character is the reform which in enfranchising women, at the same time imposed upon them duties of citizenship hard for them to perform. Of these duties none are more difficult for women than that of determining the issues in a case at law. There are many serious and embarrassing situations caused by a woman's presence on a jury and these embarrassments sometimes affect the woman herself and sometimes the case which she is called upon to decide.

In England recently a judge at the Cornish Assizes allowed all women who desired to do so to withdraw from cases involving the investigation of acts of infidelity, adultery, obscenity and immorality. The judge said he was sorry to lose their services, because he thought women were, in such cases, better judges of the truth than men, and could more accurately pass upon the guilt or innocence of the "woman in the case."

Women are not only embarrassed themselves by service on a jury, but they are sometimes very embarrassing to lawyers on both sides of a case who do not know the psychology of a woman's mind and are not sure which way she is going to jump. For this reason, in many criminal cases, lawyers for the defense, at least, have been in the habit recently of striking the names of all women from the jury lists.

Women defendants themselves seem most anxious not to be tried by women. Two recent murder trials in Chicago and Cleveland illustrate some of the interesting phases of the sex question in the case of jury selection. The Chicago prosecutor declared, when a fair defendant had been acquitted by a male jury of the murder of

her lover, that men in Cook County would not convict a beautiful woman. Whether this was not too broad a generalization, even if restricted to the chivalrous spirit of Cook Countyans, it seems to us to be a conclusive argument for woman's presence on a jury when a fair woman is the defendant. A woman juror will make the men understand the woman's motive; she will tear off the woman's mask and show up her guilt or innocence in such true colors that justice to society, as well as to defendants in such cases will be secured.

In the Kaber case, tried in Cleveland, the defense, it is reported, objected to women on the jury. They were evidently afraid of a woman's severity in passing judgment upon another woman who has not only dishonored her sex, but destroyed a home.

*"And when our sex from injuries takes fire,
Our softness turns to fury—and our thoughts
Breathe vengeance and destruction."*

* Voltaire said that "all the reasoning of men is not worth one sentiment of women." This, it will be objected, is just the reason why women should not serve on a jury, but to our mind it is a very strong recommendation in behalf of a woman's fitness to be a juror. It is ridiculous, in the first place, to say that jurymen ever "reason" about the evidence. The ordinary jurymen has not the mental training by which he is able to solve a complicated state of facts and reach a right conclusion under the law and the evidence. As a matter of fact, in most cases, he pays very little attention to either the law or the evidence, and absolutely none whatever to the judge's instructions. His feelings decide the cases. The "impressions" made upon him by the parties, witnesses and attorneys lead him to the conclusion which he promptly embodies in a "verdict." If he is in doubt he throws up a dollar—heads, I win; tails, you lose.

If we were compelled to rely upon the "sentiments" of men or of women for justice, we should prefer to be tried by a jury of

women, provided we knew we had a just cause, since a woman's intuition will reach a just conclusion where frequently a man, who is unable or refuses to use his reason, will stumble into error.

A striking instance of this difference in the conceptions of justice between men and women came to the attention of the writer a few months ago. A group of ladies, some employed women and others housekeepers, were discussing a verdict of several thousand dollars given by a jury of men in favor of a maid against her mistress, a widow in comfortable circumstances in a western city. The maid had slipped and fallen on a hardwood floor which she herself had taken care of and polished for many years. The injustice of making the mistress liable for trying to keep her home beautiful in favor of one who was perfectly familiar with the surroundings and had herself prepared the floor and arranged the furnishings was so apparent to the women's sense of justice as to call for instant condemnation. We are inclined to believe that the ladies were right.

We are not alarmed at the new problems brought about by the enlargement of women's sphere of influence, at least, so far as the administration of the law is concerned. The embarrassments can easily be overcome; proper exemptions can and should be made. Mothers with little children to care for may, on proper showing, be excused. But the influence of women in the jury box cannot, on the whole, but prove wholesome and beneficial.

NOTES OF IMPORTANT DECISIONS

ATTRACTIVE NUISANCE DOCTRINE DEFINED.—Judicial nomenclature is not always logical or accurate and Judge Hough, in a recent case, takes exception to the word "nuisance" in the rule making the owner of a structure attractive to children liable for resulting injuries on the ground of maintaining

a nuisance. *New York, N. H. & H. R. Co. v. Fruchter*, 271 Fed. 419 (C. C. A., 2d Cir.).

The question arose in this way: The City of New York at 149th street, maintains a bridge over the railroad tracks of the defendant. To the top girder of this bridge the defendant had, with the city's permission, fastened an electric wire. This top girder was 24 feet above the roadway and was strengthened and connected by trellis or lattice work with the beams and posts holding up the roadway. This metal lattice work made it possible for boys to climb to the top girder with no difficulty. Plaintiff, eight years old, climbed this lattice work to investigate a pigeon's nest. While reaching for one of the pigeons his hand came in contact with the company's live wire, from which he received the injuries for which he brings suit. The company contended that the bridge with the wire was not an attractive "nuisance" since it was a lawful structure and therefore could not be technically a nuisance. To this the Court replied:

"So it is too obvious to need comment that the court below treated the claim in suit as covered by what are known as the 'attractive nuisance,' 'lure,' or 'trap' cases. Since, so far as the courts of the United States are concerned, these cases are all assumed to rest on *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, the word 'nuisance' is inappropriate. A nuisance is that which 'unlawfully worketh hurt, inconvenience, or damage,' and neither the turntable of the *Stout* case nor the electric wire here to be considered was a nuisance; both were lawful enough. But many a lawful thing may be so negligently managed, handled, or maintained as to give rise to causes of action in tort. The true doctrine is that any composition of matter which lures or attracts the confiding ignorance of childhood to its own harm must be safeguarded as circumstances require, and of course the circumstances vary in almost every instance."

The defendant raised the question that it was the bridge and the lattice work on the bridge which was the "attraction" to children and not defendant's wire. To this the Court replied:

"It is noted that the defendant's structure was lawfully placed on top of the city bridge, and that probably the prime temptation for a boy was clambering up the bridge, which did not belong to defendant. But it was perfectly possible to physically protect the wire which did belong to defendant, while leaving the protection of the bridge to its own proprietor. This difference in ownership does not make any difference in the law. *Electric, etc., Co. v. Healy*, 65 Kan. 798, 70 Pac. 884."

THE PRESENT STATE OF INTERNATIONAL LAW.*

It is obvious that we cannot go on assuming that the laws and customs of war on land and at sea, the rules which regulate the rights and duties of neutral Powers and persons in case of war, retain the authority which we supposed them to possess in the month of July, 1914. These rules imposed their obligation upon all parties to the great conflict, and, when violated by one party, they could not reasonably be deemed to restrain the other belligerents. So, the world went on for several years without much reference to them; and the question now is: How far do they exist? In many ways the conditions which gave rise to these rules have been materially changed. The new modes of conducting war under which practically entire peoples are mobilized either for combat or supply have apparently destroyed the distinction between enemy forces and non-combatant citizens, so that the differences which underlie the law of contraband disappear. The whole people would seem to be an enemy force, and all goods destined for their use would appear to be contraband. The historic declaration of Paris that "the neutral flag covers enemy goods with the exception of contraband of war" and that "neutral goods with the exception of contraband of war are not liable to capture under the enemy's flag" would seem to have been swallowed by the exception, and the doctrine that "free ships make free goods" and that "blockades in order to be binding must be effective" appear to have become idle phrases. The submarine, the Zeppelin and the airplane, wireless telegraphy, the newly achieved destructive power of high explosives and of poisonous gases, have created conditions affecting both belligerents and neutrals not contemplated when the old rules

were established, and in many respects the old rules are not adapted to deal with the new conditions.

More important still is a fact which threatens the foundation of all international law. The doctrine of *kriegsraison* has not been destroyed. It was asserted by Bethman Hollweg at the beginning of the war when he sought to justify the plain and acknowledged violation of international law in the invasion of Belgium upon the ground of military necessity. The doctrine practically is that if a belligerent deems it necessary for the success of its military operations to violate a rule of international law, the violation is permissible. As the belligerent is to be the sole judge of the necessity, the doctrine really is that a belligerent may violate the law or repudiate it or ignore it whenever that is deemed to be for its military advantage. The alleged necessity in the case of the German invasion of Belgium was simply that Belgium was deemed to be the most advantageous avenue through which to attack France. Of course, if that doctrine is to be maintained, there is no more international law, for the doctrine can not be confined to the laws specifically relating to war on land and sea. With a nation at liberty to declare war, there are few rules of peaceful intercourse, the violation of which may not be alleged to have some possible bearing upon a military advantage, and a law which may rightfully be set aside by those whom it is intended to restrain is no law at all.

The doctrine has not been abandoned. It was formally and authoritatively declared by the German Government and acted upon throughout the war. We can find no ground to justify the conclusion that a plainly unrepentant Germany does not still maintain the soundness of the doctrine as a part of its historic justification, nor has there been any renunciation by the allies of Germany. We must, therefore, face the fact that the law which during the course of three centuries had

*A revision of an address of Hon. Elihu Root before the American Society of International Law, April 27, 1921.

become apparently firmly established upon the universal acceptance and consent of all the members of the community of civilized nations is shaken to its foundation by the repudiation of its moral obligation on the part of the four Central Powers — Germany, Austria-Hungary, Turkey, and Bulgaria, which at the outbreak of the war had over 144,000,000 inhabitants.

Few more futile public performances can be found in the history of international intercourse than the long diplomatic discussions which accompanied the earlier year of the war between neutral nations and Germany, about the rules of international law and their application to the conduct of Germany's military and naval proceedings, while Germany had already publicly declared that she would not deem herself bound by any rules she found to be disadvantageous to herself. The same will be true in the future if the same condition exists. It will be impossible to maintain the restraint upon national conduct afforded by the rules of international law so long as so great a part of the civilized world asserts the right to disregard those rules whenever it sees fit. Either the doctrine of *kriegsraison* must be abandoned definitely and finally, or there is an end of international law, and in its place will be left a world without law, in which alliances of some nations to the extent of their power enforce their ideas of suitable conduct upon other nations.

Another threatening obstacle to international law exists in the rapid development of Internationalism. This is presented by the avowed purposes of the Third Internationale aiming at the destruction of national governments and the universal empire of the proletariat; by the fact that the brutal and cruel despotisms of Lenin and his associated group has been able to maintain its ascendancy over the vast territory and

population of Russia, calling itself a dictatorship of the proletariat but making itself a dictatorship over the proletariat as well as all other classes, and ruling in the name of a world revolution for the accomplishment of the purposes of the Third Internationale. It is presented also by the universal propaganda carried on with almost religious fervor in all countries and seriously affecting the leadership of labor in many countries. That propaganda, exceedingly subtle and ingenious, through the world has toppled over the wits of parlor Socialists from their insecure foundations of education superior to their intelligence, and is making them the unconscious agents of promoting political principles which they would abhor if they understood them and in aiding sinister projects for profit in which they personally have no part. The organization of the civilized world in nations is confronted since the war with a vigorous and to some degree prevailing assertion that a much better organization would be that of government by class existing in all nations and superior to all.

International law, of course, is based upon the existence of nations. There is no common ground upon which one can discuss the obligations of international law with the Third Internationale, and just so far as the ideas of Lenin and Trotsky influence the people of a civilized country just so far the government of that country is weakened in the performance of its international obligations.

The existence of nations is not an accident of locality or of language or of race. It is one phase of the struggle of mankind for liberty. The independence of nations is an assertion of the rights of different groups of men having in the main different customs, traditions, habits of thought and action, ideas of propriety and of right, to have local self-government. This is true whatever the form of government; whether it be a monarchy or an aristocracy permitted by the peo-

ple of the country or a republic in which rulers are elected by the people, the distinction is the same between government in accordance with the people's own conceptions of right and propriety and government by an alien force having different and incongruous conceptions. There are few more injurious influences in international affairs than the inability of the people of one country to understand or to realize the differences between themselves and the people of other countries in fundamental and often unexpressed preconceptions. These differences affect the understanding in the different countries of every act done and every word used. They are not matters of reason to be solved intellectually like a problem of Euclid. They are the results of long ages of tradition, modes and habits of thought, inherited assumptions regarding the conduct of life. One race of men take off their shoes and keep on their hats, another race take off their hats and keep on their shoes under similar conditions to express similar sentiments of respect. To the people of one country polyandry is the natural social organization, to the people of another polygamy, and to the people of others monogamy is natural and appropriate. The people of some countries consider that justice is best attained by applying a system of excluding evidence according to rigid rules of relevancy and competency, while the people of other equally civilized countries consider that the same result may be best attained by admitting in evidence anything that anybody chooses to say on the subject. None of these differences is the result of the working out of problems by pure reason. They come from the fact that peoples of different countries and of different races do not think alike and cannot think alike, because their intellectual processes are the resultants of different traditional conceptions combined with the apparent logical premises of each problem.

The most grinding, possible tyranny is to be found in the intimate control of a people by other races or rulers who do not understand the people whom they rule. The vice of tyranny is so widespread, the tendency to tyrannize over others is so universal, especially among those who think themselves better than others, that only the highest intelligence creates exceptions to the rule of oppression in alien control. The declaration of the independence of nations, large and small, is an assertion of the right to be free from the oppression of alien control. Internationalism would fasten that oppression upon the world without recourse.

The fundamental ideas of international law are, first that each nation has a right to live according to its own conceptions of life; second, that each national right is subject to the equal identical right of every other nation. International law is the application of these principles through accepted rules of national action adapted to govern the conduct of nations toward each other in the contacts of modern civilization. Internationalism, by destroying the authority and responsibility of nations and the law which is designed to control their conduct toward each other would destroy the most necessary bulwark of human liberty, the chief protection of the weak against the physical force of the strong, and substitute the universal control which the nature of men will make an inevitable tyranny.

The long, slow process of civilization with its peaceful attrition between individuals and between local and tribal groups tends towards the steady enlargement of nations through the reconciliation of ideas and the adoption of common standards, making it easy for different groups to live together under the same government. Every great country shows the results of this process. Burgundy, Provence and Brittany, Wessex, Sussex, and Northumbria, Wales, England and

Scotland, Piedmont and Naples have come to live peaceably together under governments in which each has a voice and in which each is understood. But that process cannot be forced any more than the growth of a tree can be forced. It can be promoted as the growth of a tree can be promoted. The parliament of man may come just as the parliaments of Britain and France and Italy have come, but it must be by growth and not by force nor by the false pretense of agreement where there is no real agreement, nor by international majorities overbearing minority nations through majority votes.

The great force of Russia which aims to impose internationalism upon the world, therefore, halts the development of international law, the very foundations of which the existing government of Russia now repudiates. As the basis of international law is universal acceptance, either Russia must be excluded from the category of civilized nations or the law must wait upon the downfall of the present regime in Russia. In the meantime, every act which tends to support that regime, whether for sentiment or for trade, is a hindrance to the restoration of law and the rule of international justice.

Under these circumstances, how are we to take up the task of promoting the development of the Law of Nations? The task cannot be abandoned. The process which owes its impulse towards systematic development to Grotius and the horrors of the Thirty Years' War cannot be abandoned. Never before was the need so great. The multitudes of citizens who now control the national governments of modern democracies and direct international policies cannot safely follow the passion of the moment or the idiosyncrasy of the individual public officer in their international affairs, without accepted principles and rules of action, without declared standards of conduct, without definition of rights, without prescription

of duties too clear to be ignored. Otherwise the world reverts to chaos and savagery.

To determine how this Society and its members may be effective in efforts to promote the development and authority of international law, some further examination of the existing international situation will be useful. The armistice of November 11, 1918, left for the successful Allied Powers two quite distinct and in some respects incongruous tasks. The first task was to decide upon the terms of peace and to require compliance with those terms. That was a matter of power, of force. It was the imposition of the will of the conquerors upon the conquered. Only the belligerent nations were concerned in it. It was a part of the war. Disarmament, reparation, disposition of conquered colonies, transfers of territory, were to be dictated as alternatives to further military punishment by the successful armies and navies. It was to be affected by the principles of reward for assistance in winning the war, of penalty for offenses against civilization in beginning and carrying on the war and by treaties between the belligerents.

The second task in necessary sequence was to give effect to the universal desire of the civilized world by bringing all civilized nations into agreement for the future preservation of peace. That was a matter, not of force, but of reason, humanity, universal instinct of self-preservation. It must be voluntary, not compulsory. It was the concern of all neutral nations equally with all belligerent nations. It presupposed a world at peace in which peace, already attained, was to be preserved. It was to follow, not to be a part of, the compulsions of conquest.

The Versailles Conference undertook to include both of these separate, distinct and incongruous processes in the same treaty. They framed a League of Nations for the future, they invited all neutrals to join and at the same time and in

the same instrument they undertook to impose penalties to which they required the defeated belligerents to submit. The defeated belligerents were not admitted to the League and had nothing to say about it, while the neutral members of the League naturally had no right or authority respecting the terms of peace imposed by the treaty. The two processes were tied together, however, by provisions making the League of Nations the agent of the conquerors to see to the execution of the terms imposed upon the other defeated nations. Thus certain powers were vested in the League including neutrals, regarding the administration of occupied territory, plebiscites, scrutiny of government under mandates. These functions plainly were to be in exercise of derivative not original authority of the League, which became a mere agent of the belligerents for those purposes. Spain, Holland, Norway, for example, and any organization which represents them can have no authority regarding a plebiscite in Silesia or the government of Danzig, except within the limits of a specific agency created by the nations which had a right won by conquest or created by treaty between such nations and Germany.

Another peculiarity of the treaty was that, although it contemplated the participation of all the belligerents, it was expressly made separable, by the provision that it should take effect when ratified by any three of the principal Powers. Accordingly, when the other principal Powers ratified the treaty and the United States refused to do so, the terms of peace became binding between Germany and the ratifying Powers, although not between Germany and the United States. And the League of Nations, no longer a mere project, came into being and still exists, uniting for specified purposes substantially all the civilized countries except the United States, Germany, Russia, Austria-Hungary and Turkey.

The natural tendency of these arrangements and the discussion and controversy which they engendered was towards great delay and confusion. The imposition of terms of peace was a matter calling for prompt decision and compliance while the conquering armies were in being and able to compel compliance. Under the distractions and discussions incident to the formation of a League for future peace, this vital process of closing the war dragged along until the Western armies had mainly disappeared; and many of the issues of the war have passed in to a new and prolonged stage of discussion.

In the meantime, the Supreme Council of the belligerents, in which the United States continued entitled to a place which she ceased to fill, has held the center of the international stage trying to bring about the state of peace which the League of Nations was formed to preserve, and at the same time the League has been struggling with its special agency under the treaty without ever having been put by its principals in the position of recognized authority; and the organization for future peace has remained incomplete in the face of continual actual war involving a majority of the people of Europe and the Near East.

In considering our course as students, lawyers, American citizens, united by common interest in the Law of Nations, I think we must assume that the conditions which I have described are temporary; that before very long the immediate issues of the war will be settled for the time being and peace will be restored; that republican Germany and her associates will abandon the arrogant assertion of the *kriegsraison*; that the brutal and cruel despotism which now oppresses the people of Russia will meet the fate which awaits the violation of economic laws and, failing to be rescued by those friends who are coming to its assistance

in this and other countries, will fall, and the people of Russia will come to their own.

When these results have been reached, there will remain the hindrances of differing forms and methods favored by the nations within and the nations without the existing League. But the idea that by agreeing at this time to a formula the nations can forever after be united in preventing war by making war seems practically to have been abandoned; and the remaining differences are not of substance and ought not to prevent the general desire of the civilized world from giving permanent form to institutions to prevent further war. In the long run, from the standpoint of the international lawyer, it does not much matter whether the substance of such institutions is reached by amending an existing agreement or by making a new agreement.

The necessary things are that there shall be institutions adapted to make effective the general civilized public opinion in favor of peace, and that these institutions shall be developed naturally from the customs, the habits of thought and action, and the standards of conduct in which civilized nations agree, and that they shall be of such a nature that the habit of recourse to them will have an educational effect and be a means of growth in justice and humanity.

The Covenant of the League, under which so many nations are now included, commits its members fully to these fundamentals, and, while it undertakes to go farther and do too much, the evident tendency of its members is to reduce this excess by interpretation and amendment and bring it down to the character of real representation of the common customs and common opinions of civilized peoples in favor of peace.

On the other hand, the United States is certain to be ready to join in some form, in seeking the same result by these same

essential methods. That will follow necessarily from the traditional policy of our country and the responsible declarations of our government in both the legislative and the executive branches.

Considering this field of preventive provisions as separate and distinct from the temporary exigencies of compulsory war settlements, if we examine both the League agreement and the declared policy of the United States for information as to common purposes, we shall find several different kinds of united action upon which there is practically agreement in principle, with difference only in degree or as to specific means.

We may pass over, as least important, although extremely useful, provisions for international co-operation in administrative services to facilitate trade and intercourse, or to apply regulations by common consent in matters of common interest. The International Postal Union, the control of wireless telegraphy, the ice patrol of the North Atlantic for the safety of the ships of all nations, are examples of this kind of co-operation. The labor provisions of the Treaty of Versailles come under the same head, although they were put into the treaty without the discussion and consideration necessary to ascertain whether they ought to be adopted or whether they met a general demand or were adapted to world conditions. Much of the time of the League organization has been devoted to matters of this character, which are really local, affecting particular groups of countries and which would be arranged, naturally and probably better, between the countries concerned, without burdening or involving the countries not concerned.

Most important for dealing with immediate danger to international peace is a system of international conferences upon questions of international policy. This is a natural growth from experience. The Algeciras Conference is a type. The Conference in London, which limited the ef-

fect of the Balkan wars, is another. It is a general belief that if Sir Edward Grey had secured the conference he sought in July, 1914, the war would have been averted. Whether it be by dispelling misunderstandings, allaying fears, soothing irritation, or by the repressive effect of general adverse opinion, a formal general conference of the principal nations ordinarily leads to a situation in which it is extremely difficult for any nation to begin war.

The weakness of the practice hitherto has been in the fact that no one had a right to insist upon a conference; no one was under obligation to attend a conference. The step in advance plainly indicated as the natural development of this most useful practice into a systematic institution, is to establish an administrative agency whose duty it shall be to call such a conference in time of threatened danger on suitable request, and to place all nations under obligation to attend the conference when called. Upon the substance of this there is no disagreement. The Council of the League does this and something more, and the difference is over the something more. The Council of the League is a perpetual, permanent conference, as distinguished from conferences *ad hoc*, to be called automatically whenever grave cause arises. No one seems to question that in one way or another there should be obligatory conferences.

Such conferences, however, deal with policy in particular exigencies, and they proceed upon motives of expediency. They are not steps in the development of the rule of right among nations. In that direction also, however, we find elements of general agreement.

The Covenant of the League of Nations in its preamble states one of its objects to be "in order to promote international co-operation and to achieve international peace and security * * * by the firm establishment of the understandings of international law as the actual

rule of conduct among governments"; and in the 14th article it provides: "The Council shall formulate and submit to the members of the League for adoption plans for the establishment of a permanent court of international justice."

The American Congress in a statute enacted August 29, 1916, expressed the American view in the most solemn form. The statute says:

"It is hereby declared to be the policy of the United States to adjust and settle its international disputes through mediation or arbitration, to the end that war may be honorably avoided. * * * In view of the premises, the President is authorized and requested to invite, at an appropriate time, not later than the close of the war in Europe, all the great governments of the world to send representatives to a conference which shall be charged with the duty of formulating a plan for a court of arbitration or other tribunal, to which disputed questions between nations shall be referred for adjudication and peaceful settlement."

The message of the President of the United States to Congress on the 12th of April, said:

"The American aspiration, indeed the world aspiration, was an association of nations based upon the application of justice and right, binding us in conference and co-operation for the prevention of war and pointing the way to a higher civilization and international fraternity in which all the world might share. * * * In the national referendum to which I have adverted, we pledged our efforts towards such an association, and the pledge will be faithfully kept."

The pledge to which the President plainly referred in the paragraph just quoted, was contained in the Republican Platform, in these words:

"The Republican party stands for agreement among the nations to preserve the peace of the world. We believe that such an international association must be based upon international justice, and must provide methods which shall maintain the rule of public right by the development of law and the decision of impartial courts, and which shall secure instant and general international conference whenever peace shall

be threatened by political action, so that the nations pledged to do and insist upon what is just and fair may exercise their influence and power for the prevention of war."

While this pledge was in the platform of one party, it was not, in fact, the subject of party controversy, and the enormous majority of over seven million votes given to the candidate standing by that platform justifies the assertion that these words state the true attitude of the American people, as that attitude is now certified in the passage which I have quoted from the President's message to Congress.

It is apparent that the attitude of the League and the attitude of America toward this subject do not differ in substance, however much they may differ as to the specific modes of effectuating the common purpose.

The duty imposed upon the Council of the League, "to formulate and submit plans for the establishment of a permanent court of international justice," has been performed, and a convention establishing such a court has been adopted by the League, and has already been ratified by many of its members. It provides for a permanent court of judges elected for fixed periods, paid fixed salaries, engaging in no other occupation, and bound to proceed under an oath which imposes upon them judicial obligation as distinguished from a sense of diplomatic obligation. To this court all nations may repair for the adjudication of their differences.

So much for the nations in the League. It is also true that this court is in substance, in everything essential to its character and function, the same court which under Mr. Roosevelt's administration was urged by the United States upon the Second Conference at The Hague in 1907, and which, at the instance of the United States, was provided for in subsequent treaties between the United States and the principal European Powers, negotiated under Mr. Knox as Secretary of

State in Mr. Taft's administration, but not finally consummated when the war intervened.

Here plainly there is agreement in substance, and the difficulties are formal.

The technical commission which in the summer of 1920 drafted the plan for a permanent court that has been adopted by the League, accompanied the plan by a unanimous recommendation as follows:

"The Advisory Committee of Jurists, assembled in the Hague to draft a plan for a Permanent Court of International Justice.

"Convinced that the security of states and the well-being of peoples urgently require the extension of the empire of law and the development of all international agencies for the administration of justice, Recommends:

"I. That a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable for the following purposes:

"1. To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.

"2. To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.

"3. To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore.

"4. To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

"II. That the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association, and the Iberian Institute of Comparative Law be invited to prepare with such conference or collaboration *inter sese* as they may deem useful, projects for the work of the Conference to be submitted beforehand to the several governments and laid before the Conference for its consideration and such action as it may find suitable.

"III. That the Conference be named Conference for the Advancement of International Law.

"IV. That this conference be followed by further successive conferences at stated intervals to continue the work left unfinished."

Plainly, these recommendations cannot receive effect now, nor until the present emergencies of an unsettled war have been disposed of. But when the time comes, they will point the way to the performance of the object of the League "for the firm establishment of the understandings of international law," and the identical purpose of the people of the United States, so often declared by their representatives.

It is to be observed that these two—the establishment of a permanent court and the restoration of the authority of international law—are cor-relative parts of the same world policy, upon the substance of which the civilized nations are in agreement.

There can be no real court without law to control its judges, and there can be no effective law without institutions for its application to concrete cases. This is the traditional policy of the United States—to establish and extend the law declaring the rules of right conduct accepted by the common judgment of civilization and to substitute in international controversies upon conflicting claims of right impartial judgment under the law in the place of war.

The existing situation presents difficulties and embarrassments in arriving at a common understanding regarding the precise modes in which this general policy shall receive effect; but I, for one, am not willing to assume that the patience and good sense of the diplomacy of the world, including our own country, will be unequal to the task of so disposing of the formal difficulties as to achieve the great object upon which all are agreed.

It is further to be observed that conference upon matters of policy, either per-

manent or occasional, on the one hand, and the establishment of law and judicial disposal of questions of right, on the other hand, are not alternative and opposing methods. They are mutually supplemental parts of one and the same scheme to prevent war. Both are methods of bringing the public opinion of the world to bear upon the settlement of controversies. Neither covers the field without the other. Never before has there been such evidence of the power of public opinion as has been afforded by the vast propaganda through which the contending nations in the great war have tried their cases at the bar of public judgment of the world, and have sought to commend their conduct to the peoples of other nations.

The idea that any formula can be devised under the working of which the world can be made peaceable by compulsion, is manifestly in course of abandonment. The public opinion of mankind is so mighty a force, that it is competent to control the conduct of individuals. But it must be an intelligent, informed and disciplined opinion. The exit of autocracies leaves the direction of foreign relations under the ultimate control of multitudinous, ill-informed and untrained democracies. In place of dynastic ambitions, the danger of war is now to be found in popular misunderstandings and resentments.

How are these vast democracies to be justly informed as to the rights and wrongs of controversies, and the fairness of policies? It seldom happens that the great multitude of citizens can argue out from first principles the complicated and difficult questions of right and wrong involved in international relations. It seldom happens that the subject is not obscured by misinformation and misleading suggestion, and by appeals to passion rather than to judgment. The only mode of meeting this great and vital need, dictated by reason and approved by experi-

ence, is the establishment of institutions through which, when strife is not flagrant, the deliberate and unbiased opinion of mankind may declare and agree upon the rules of conduct which we call law, by which in times of excitement judgment may be guided, and by which the peoples may be informed of the limits of their rights and the demands of their duties; and by the establishment of institutions through which disputed facts may be determined and false appearance and misinformation may be stripped away and the truth be made known to the good and peaceful peoples of the world by the judgment of impartial and respected tribunals. In such institutions rests the possibility of growth of development for civilization. Through them may be established by usage the habit of respecting law. They may create standards of conduct under which the thoughts of peoples in controversy will turn habitually to the demonstration of the justice of their position by proof and reason, rather than by threats of violence, so that the time will come when a nation will know that it is discredited by the refusal to maintain the justness of its cause by the procedure of justice.

This is the work of international law, applied by an international court. The process will be slow, but all advance of civilization is slow. Not what ultimate object we can attain in our short lives, but what tendencies towards higher standards of conduct in the world we can aid during our generation, is the test that determines our duty of service. The conditions which will hinder and delay effective action for the re-establishment of law are many and serious, but we must prepare. When the time for action comes, it must find the results of study, discussion and matured thought ready, as material for authoritative judgment by the nations, and, meantime, the voice of the least of us may be of some avail, urging that force be repressed and expediency

be guided by the public opinion of the world made effective by declared and accepted rules of public right applied by competent and impartial international tribunals.

ELIHU ROOT.

New York, N. Y.

CORPORATIONS—RIGHT OF STOCKHOLDER
TO NEW STOCK.

HOYT v. GREAT AMERICAN INS. CO.

188 N. Y. S. 257.

(Supreme Court, Special Term, New York
County. March, 1921.)

An old stockholder has a vested right to take his proportionate share of new or increased stock at par, in the absence of laches or acquiescence.

DONNELLY, J. Demurrer by plaintiff to defendant's affirmative defense to the first cause of action set forth in complaint. This cause of action sets forth a claim for damages against the defendant in the sum of \$8,662.50, arising out of the alleged failure of the defendant to give the plaintiff, or her testator, who was the holder of record of 35 shares of the capital stock of the defendant, a reasonable opportunity to subscribe to a proportionate amount of its increased capital stock. The complaint alleges the holding of a special meeting of the stockholders on October 24, 1918, at which the stock was increased from \$2,000,000 to \$5,000,000, and a resolution was passed authorizing the defendant's directors to offer the increased stock to its stockholders pro rata at \$150 per share, payable in cash, and that the defendant, pursuant to such resolution, made an offer to its stockholders on or about November 4, 1918, and that the proportionate amount of the increased stock to which plaintiff's testator was entitled to subscribe, by reason of his ownership of 35 shares, was 52½ shares. It is also alleged that plaintiff's testator died on November 10, 1918, and that letters testamentary were issued to plaintiff on December 11, 1918; that the testator and his representatives were at all times ready, willing, and able to subscribe for the said 52½ shares of increased stock, which was worth greatly in excess of the subscription price of \$150 a share, but that the defendant failed to give the plaintiff's testator and his

legal representatives a reasonable opportunity to subscribe to the same, and in violation of their rights disposed of said 52½ shares on or about December 15, 1918, to its directors, or some of them. It is also alleged in article sixth on information and belief that the plaintiff's testator received no advance notice of the stockholders' meeting held on October 24, 1918, and had no knowledge that the meeting was being held, and that no advance notice of the meeting was given or sent to him at his last known post office address.

The answer, in addition to denials of various allegations of the complaint, contains a separate affirmative defense to the first cause of action, in which there are no denials, and which, among other things, allege as follows:

"On or about October 24, 1918, the capital stock of the defendant was duly increased from \$2,000,000, divided into 20,000 shares, of the par value of \$100 each, to \$5,000,000, divided into 50,000 shares, of the par value of \$100 each, pursuant to a resolution duly adopted by more than a majority of the stockholders of the defendant, at a meeting of the stockholders duly held on October 24, 1918. A copy of the notice of said meeting, stating the purpose thereof, was inclosed in a sealed, post-paid envelope, addressed to Albert Sherman Hoyt, Post Office Box 250, Yokohama, Japan, which was the address of the said Albert Sherman Hoyt appearing on the books of the defendant, and the last address which he had furnished it, and was his last address known to the defendant, and was duly mailed on or about October 7, 1918. Accompanying the said notice was a circular letter to the defendant's stockholders, stating the reasons for the said increase of its capital stock, and that it was of great importance to have all the new stock issued and paid for before the end of the year 1918, and further stating that the new stock would be issued to the stockholders, in proportion to their holdings, at \$150 a share, and that one-half of the purchase price would be called for in about 30 days from the time of the increase, and the remaining one-half in about 60 days. * * * At the times hereinbefore mentioned and for some time prior thereto, the defendant had, pursuant to authorization from the said Albert Sherman Hoyt, sent checks for dividends on the stock standing in his name to the Title Guarantee & Trust Company, 175 Remsen street, Brooklyn, New York, and knowing that there would not be time for the said Albert Sherman Hoyt to exercise his right to subscribe for a proportionate part of the increased stock within the time fixed for the stockholders, if the subscription warrant were sent to him at his registered address in Japan, above mentioned, the defendant sent a copy of said letter of October 25, 1918, to the said Title Guarantee & Trust Company, with a letter inquiring whether it was authorized to take any action in connection with the said subscription rights on the said stock standing in the name of Albert Sherman Hoyt. In reply to the said letter the Title Guarantee &

Trust Company informed the defendant that the said Albert Sherman Hoyt had returned to America, and that his counsel in New York City, who attended to all his personal business affairs, were Steele & Otis, 25 Broad street, New York City, and that the matter should be taken up with them. The defendant fully believed that the said Steele & Otis did have charge of the personal business affairs of the said Albert Sherman Hoyt, and it accordingly sent the subscription warrants, covering the rights on the said stock standing in the name of the said Albert Sherman Hoyt, to the said Steele & Otis, on or about November 4, 1918, and asked them for instructions in regard to the exercise of the said rights, but the defendant received no instructions from them."

It is conceded by both parties that it is the law of this state that an old stockholder has a vested right to take his proportionate share of the new or increased stock at par, in the absence of laches or acquiescence. It is likewise conceded that a majority of the old stockholders have a right to fix reasonable conditions and regulations concerning an increase of stock, particularly as to time. *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738; *Sommer v. Armor Gas & Oil Co.*, 71 Misc. Rep. 211, 128 N. Y. Supp. 382.

The only question, therefore, presented by this demurrer, is whether or not a reasonable notice, or any notice whatever, of the right of the plaintiff's testator to subscribe to his proportionate share of the increased stock was ever given. It appears from paragraph 1 of the separate defense that the address of plaintiff's testator appearing on the books of the defendant was "Post Office Box 250, Yokohama, Japan." It is not alleged that any such notice was mailed to said address, or any other address specifically authorized or designated by plaintiff's testator; but in lieu thereof an excuse for not sending such a notice is set forth in paragraph 3 of said separate defense.

Stockholders are entitled to a reasonable time in which to subscribe. A reasonable time was not given to the plaintiff's testator; in fact, no time at all was given to him, as it appears on the face of the separate defense that no notice whatever was sent to him, and the facts set forth in lieu thereof do not constitute laches or waiver, within the meaning of *Sommer v. Armor Gas & Oil Co.*, supra.

Demurrer sustained, with \$10 costs.

NOTE.—Right of Stockholder to Subscribe to New Issue of Stock.—Upon an increase in capital stock of a corporation, a stockholder is entitled to maintain his proportionate influence, and for that reason must be given an opportunity to purchase a proportionate amount of the new shares before they can be offered to outsiders.

Kingston v. Home Life Ins. Co., Del., 101 Atl. 898; *Hammer v. Cash, Wis.*, 178 N. W. 465.

However, an issue of new stock may be upon such terms as is voted by the stockholders within the scope of legislative sanction, and accordingly stockholders may surrender or be deprived of their right to subscribe to new stock. *Brown v. Boston & M. R. Co., Mass.*, 124 N. E. 322.

Where an increase in the capital stock of a railroad was authorized by amendment of its articles of incorporation for the purpose of building an extension, and it was provided that stock not necessary to be sold should be held, a stockholder is not entitled under the amendment to purchase a proportionate number of new shares and, the extension being abandoned, an issue of new stock to the president, who was a shareholder, was unlawful. *Hammer v. Cash, Wis.*, 178 N. W. 465.

The directors of a corporation cannot vote a new issue of stock and subscribe for it themselves, without giving the stockholders generally an opportunity to subscribe in proportion to their existing holdings. *Glenn v. Kittanning Brewing Company*, 259 Pa. 510; 103 Atlantic 340. There is a valuable note appended to this case in L. R. A. 1918 D, 741.

One who acquires corporate stock without knowledge that the corporation had previously given third person exclusive right to subscribe to corporate stock to be thereafter issued, cannot attack such contract. *Kingston v. Home Life Ins. Co.*, 101 Atl. 898.

A stockholder who is entitled to a share of an increase of stock saves his rights by protesting against the sale of it to another, without making a demand for his stock and tender of the price. *Stokes v. Continental Trust Company*, 186 N. Y. 285; 78 N. E. 1090, 12 L. R. A. (N. S.) 969.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE SOUTH DAKOTA BAR ASSOCIATION.

The twenty-second annual meeting of the South Dakota Bar Association will be held at Watertown, August 3 and 4, 1921.

The annual address of the President will be made by Mr. Claude L. Jones, of Parker. The annual address will be made by Mr. Robert L. Stewart, of Chicago. Other addresses will be made by the following: "Economic and Juridical Consideration of Hydro-Electrics, apropos Chapter 257, Laws 1921," by Mr. William M. Potts, of Mobridge; "Small Claims Court Procedure," by Hon. John Howard Gates, of the Supreme Court of South Dakota; "The Tendencies of Our Profession," by Mr. George Phillip, of Rapid City; "The Bench and the Bible," by Mr. James Brown, of Chamberlain.

Following the afternoon session on Thursday, there will be an excursion on Lake Kampesa, and in the evening the annual dinner will be given at the Country Club.

HUMOR OF THE LAW.

When young he seemed quite promising,
Did little Willie Thomas,
And, true to form, he grew up and
Was sued for breach of promise.

Scene, a South Carolina courthouse. Judge, Irish. Prisoner, Irish. Accuser, a six-foot negro whose jaw bone had been broken by the Irish fireman.

"And you say this perfectly respectable sailor broke your jaw without you ever having spoken to him, and you a complete stranger?" "Yes, judge; ah was just sitting on a stone pile takin' the sun when this man struck me full on the jaw." "But you must have done something?" "No, judge; ah was just sittin' in the sun." "But why should this perfectly decent stranger break your jaw if you were just sitting in the sun?"

"Beats me, judge. Ah don't know; ah was just sittin' in the sun singing when—"

"Ah, singing," says the judge; "what were you singing?"

"Ah was just humming 'Sure Ireland must be heaven, for me mudder came from dere'."

The following letter was received by a wholesale merchant from a country merchant:
Dear Sir:

I received your letter about what I owes you. *Now be pashent*. I ain't forgot you, and as folks pays me I'll pay you, but if this was judgment day and you was no more prepared to meet your God, than I am to meet your account, then you show would go to Hell.

Good by Bill Jones.
—*The Docket*.

"Sages tell us that the best way to get the most out of life is to fall in love with a great problem or a beautiful woman."

"Why not choose the latter and get both?"

Tommy: What does LL.D. after a man's name mean?

Jimmy: I guess it means that he's a lung and liver doctor.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Adoption** — Collateral Attack.—When the adoptive parents obtain the decree they asked for and take the child into the family and treat it as their own, they and their heirs and personal representatives are estopped from asserting that the child was not legally adopted.—*In re Reichel*, Minn., 182 N. W. 517.

2. **Attorney and Client**—Contingent Fee.—Where attorneys were employed on a contingent fee of one-third of any recovery, a settlement by the client without their consent was not a breach of the agreement of retainer, and they were only entitled to one-third of the amount of the settlement.—*Lefkowitz v. Leblang*, N. Y., 187 N. Y. S. 520.

3. **Bankruptcy** — False Pretenses. — Under Bankruptcy Act, § 17a, as amended by Act Feb. 5, 1903, providing that a discharge does not release liabilities for obtaining property by false pretenses or false representations, a debt created by fraud or fraudulent misrepresentation is not affected by the discharge, and is not within the exclusive jurisdiction of the bankruptcy court.—*M. C. Kiser Co. v. Gerald*, Ala., 88 So. 49.

4.—**Operation of Bankruptcy Suit**.—A suit instituted under the Bankruptcy Law to have a citizen declared a bankrupt takes out of the hands of his creditors the ordinary remedial processes, suspends the ordinary right to sue which the creditor has, and puts in place thereof a new and comprehensive remedy for the creditor designed for the benefit of all creditors; the term "bankruptcy" meaning the status of a person made subject of the application of a bankruptcy law.—*Norin v. Scheldt Mfg. Co.*, Ill., 130 N. E. 791.

5.—**Surrender Value of Life Insurance Policy**.—Where a bankrupt's trustee has become owner, as an asset of the estate, of a policy of insurance on the bankrupt's life, having a surrender value, payable to bankrupt's wife as a beneficiary, but containing a provision that the insured could change the beneficiary "from time to time with the consent of the company by written notice to said company," provided, however, that "no other than the insured's estate, father, mother, husband, wife or dependent child will be made beneficiary under this policy," the company has no interest which can justify its refusal to pay the surrender value to the trustee.—*In re Greenberg*, U. S. C. C. A., 271 Fed. 258.

6. **Banks and Banking**—**Lien on Deposit**.—A bank has a lien on a deposit for the depositor's indebtedness to it, and may apply the deposit on the indebtedness.—*Lebreicht v. New State Bank*, Mo., 229 S. W. 285.

7. **Bills and Notes**—**Good Faith**.—In action on a note in which plaintiff claimed to be a pur-

chaser for value before maturity and without notice of any defense, where there was no evidence to justify conclusion that plaintiff was guilty of bad faith, and where plaintiff knew maker by reputation, knew or believed that he was financially good, and purchased the note from a reputable citizen without being in any way brought into contact with the payee or the other indorsers except one who represented that the note was regular, the court properly pay the instrument according to the tenor of plaintiff bank had purchased note in good faith, and declared it a good-faith purchaser as a matter of law.—*Farmers' State Bank v. Betcher*, Wash., 197 Pac. 15.

8.—**Liability of Acceptor**.—Under Negotiable Instruments Law, § 112, providing that the acceptor by his acceptance engages that he will took from the jury the question of whether his acceptance, and admits the existence of the drawer, the genuineness of his signature, his authority to draw, the existence of the payee, and his then capacity to indorse, an acceptance gives a draft the effect of a promissory note; the acceptor being liable as maker and the drawer as first indorser.—*Anglo & London-Paris Nat. Bank v. S. A. Jacobson Co.*, N. Y., 187 N. Y. S. 508.

9.—**Place of Signature**.—In view of Acts 1909, § 126, defining a bill of exchange, an averment that a bill of exchange was drawn by defendant is under Code 1907, § 5382, subd. 3, equivalent to an averment that it was signed by defendant, and has the same effect as an allegation under subd. 1 that the note was "made" by defendant.—*Knox v. Rivers Bros.*, Ala., 88 So. 33.

10.—**Transfer to Maker**.—Under Rev. Code 1919, § 1822, subd. 5, declaring a negotiable instrument discharged when the principal debtor becomes the holder thereof after maturity in his own right, the obligation on a note and check of the maker there of is extinguished where after they are overdue one holding them as collateral for the debt of another transfers them to such maker under the guise of a sale to him of such debt with a transfer of the collateral.—*Aulwes v. Farmers' Bank*, S. D., 182 N. W. 528.

11. **Brokers** — **Withdrawal of Principal**. — Where R, to whom brokers were authorized to make an offer to exchange properties, had notice that the principal had withdrawn the offer, and one of the agents took him to view the property merely in the hope that he and the principal would come to an understanding, and, in accepting the offer, notwithstanding the withdrawal, R relied on a statement in the offer that it would not be revoked, and not on anything done by the agents, they were not liable for the principal's expenses in defending R's suit for specific performance.—*Roth v. Moeller*, Cal., 197 Pac. 62.

12. **Carriers of Goods**—**Measure of Damages**.—The measure of damages for loss of household goods by a carrier is their actual or reasonable value at destination at the time they should have been delivered, as distinguished from a fanciful or sentimental value, where the goods are secondhand and have no standard market value.—*Hines v. Warden*, Tex., 229 S. W. 957.

13. **Carriers of Passengers**—**Degree of Care**.—In action for death of prospective interurban car passenger, waiting for car at crossing which was not a regular stopping place, and at which the car stopped only on signal, when struck by freight car which had not stopped after answering signal by blasts of whistle signifying that it would not stop, the deceased as to such freight car was not a passenger within the rule as to degree of care required of railroad toward passengers.—*Van Sickle v. Grand Rapids*, G. H. & M. Ry. Co., Mich., 182 N. W. 132.

14.—**Negligence**.—In an action against a carrier for death of an intending passenger, struck and killed by one of its trains, held, that it could not be said as a matter of law that a speed of from 12 to 30 miles per hour on its own right-of-way in such case constituted negligence.—*Washington, B. & A. E. Ry. Co. v. State*, Md., 113 Atl. 338.

15.—**Rates**.—Where the United States requested a railroad company to furnish transportation for men in the military service, and accepted the service without arranging for a different or reduced rate, as it might under Interstate Commerce Act, § 9, it assented to and

became obligated to pay the established rate of the carrier under Act July 27, 1866, § 6, less any lawful land grant deduction, and it was error to determine this rate by combining the party rate covering a part only of the distance, and the individual rate for the remainder, and then making any deductions on account of land grants.—*Atchison, T. & S. F. Ry. Co. v. United States*, U. S. S. C., 41 Sup. Ct. 456.

16. **Commerce**—Posting of Bills on Billboards.—Assuming that the business of advertising solicitors in sending their customers' advertisements to be posted on billboards in various towns and cities throughout the country is, as between them and their customers, interstate commerce, after the posters arrive at destination, the posting of them by bill posters is a purely local service, only incidentally affecting interstate commerce, and rules of an association of bill posters, prohibiting its members from accepting work from solicitors not licensed by the association, regulating prices for bill posting and prohibiting licensed solicitors from employing other bill posters, do not violate Sherman Act.—*Charles A. Ramsay Co. v. Associated Bill Posters of the United States and Canada*, U. S. C. C. A., 271 Fed. 140.

17. **Taxation of Intangible Property**.—A company, having by contract an exclusive right to operate an electric railroad over a bridge over the Mississippi River at St. Louis and having profitable operating arrangements with connecting street railway companies, whereby it has considerable earning capacity on a small extent of physical property, has intangible property other than its mere right to conduct interstate passenger traffic over the bridge, and a tax on such intangible property is not invalid as a direct tax and burden on the right to engage in interstate commerce.—*St. Louis & E. St. L. Electric Ry. Co. v. State of Missouri*, U. S. S. C., 41 Sup. Ct. 488.

18. **Contracts**—Effects of World War.—The court will take judicial notice of the conditions that attended the prosecution of the world war, and the effect of such conditions upon the country at large, and as affecting building and other construction activities generally.—*Home Builders v. Busk, Neb.*, 182 N. W. 589.

19. **Partial Breach**.—In a contract between plaintiff and defendant, who were competing theater proprietors, and a booking office whereby plaintiff's exclusive right to booking privileges of the office were transferred to defendant, and plaintiff promised to refrain from exhibiting vaudeville in his theater during the contract, and was to receive a stipulated weekly payment, the promise to refrain from the exhibition of vaudeville was not the sole consideration for the weekly payments, and hence a breach of such promise was a partial breach only.—*Princess Amusement Co. v. Wells*, U. S. C. C. A., 271 Fed. 226.

20. **Public Policy**.—Contracts between a street car company and its employees, whereby they agreed not to join any labor union during the term of their service, not violating any provision of the state or federal constitution or statutes or any rule of the common law, are not contrary to "public policy," which means that principles of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.—*Nashville Ry. & Light Co. v. Lawson*, Tenn., 229 S. W. 741.

21. **Corporations**—Cancellation of Stock.—Where buyer of stock contracted to become bound therefor only on its transfer on the books, and on turning it in for transfer the corporation cancelled it under order of the Charter Board, he never became its owner, and so far as he was concerned there was no conversion.—*Lilley v. Sterling Oil & Refining Co., Kan.*, 197 Pac. 201.

22. **De Facto**.—Where three individuals signed a certificate of incorporation two days before the happening of an accident for which the company was sued for damages, which certificate was recorded in the county clerk's office the day after the accident and filed in the secretary of state's office four days after the accident, and they did certain acts in attempted execution of the powers conferred by the certificate of incorporation, a jury was justified in finding that the company was, at the time of the accident, a corporation de facto, and there-

fore liable.—*Frawley v. Tenafly Transp. Co., N. J.*, 113 Atl. 242.

23. **Libel by Controlled Company**.—A publishing company, organized by a Socialist publishing company to serve as mouthpiece for the latter's propaganda, being a corporate entity until dissolved, is liable for its own libels, but the technical distinction of two distinct organizations cannot be invoked by the Socialist publishing company to defeat the cause of action against it on the part of a society libeled by the controlled publishing company, both publishing companies being jointly and severally responsible to the libeled society.—*Finnish Temperance Soc. Sovittaja v. Publishing Co., Mass.*, 130 N. E. 845.

24. **Damages**—Breach of Contract.—In corporation's action for breach of contract to sell its stock, plaintiff could not recover items of costs incurred by it in a stock-selling campaign begun by it on its own account before abandonment by defendant broker, and, according to its own contention, undertaken with the consent of defendant, since these costs could not have been charged to defendant if it had performed its part of the contract.—*Middendorf, Williams & Co. v. Alexander Milburn Co., Md.*, 113 Atl. 348.

25. **Destruction of Trees**.—The measure of damages for the destruction of trees cannot be based solely upon the cost of their production to the time of such loss.—*Watkins v. Mountain Home Co-operative Irr. Co., Idaho*, 197 Pac. 247.

26. **Electricity**—Contract for Rates.—Where by ordinance a power company was given the use of the city streets, and, subject to a provision for maximum rates and for arbitration, was given the right to charge for commercial light and power rates which it might fix, no amendment of the ordinance was required to permit it by contract to fix such rates for an agreed period, or to make a binding contract with the city to exercise its right to make charges in a certain way, nor would such a contract operate as an amendment of the ordinance.—*City of Saginaw v. Consumers' Power Co., Mich.*, 182 N. W. 146.

27. **Explosives**—Negligence.—In action against an oil company for negligence in leaving oil barrels not completely emptied in the rear of a grocery store, where during a fire burning the store and other buildings the barrel exploded and injured plaintiff while assisting in extinguishing the fire, a directed verdict for defendant held proper, the evidence showing that defendant used the same method as other oil companies in delivering, emptying, and removing their oil barrels, and indicating that the drayman in charge of such delivery and removal by any method he saw fit to use was not defendant's agent or servant, but an independent contractor.—*Williams v. Gulf Refining Co., Tex.*, 229 S. W. 959.

28. **Frauds, Statute of**—Authority of Auctioneer.—The authority of an auctioneer to sell land at auction must be in writing, and an auctioneer who is not authorized in writing cannot make a memorandum which will bind the owner of land sold under Civ. Code, § 1347, even though the owner of the land and his wife are present at the sale, in view of § 1238, subd. 5, requiring authority of agent to be in writing.—*Corner v. O'Malley, S. D.*, 182 N. W. 530.

29. **Fraudulent Conveyances**—Sign Statute.—Conduct of business by bankrupt's wife with husband as manager without sign on building held not a violation of the Sign Statute.—*Rubenstein v. Lynchburg Shoe Co., Miss.*, 88 So. 14.

30. **Garnishment**—Property Taken as Evidence.—Money or other property taken from prisoner at time of his arrest, upon belief that it is connected with the crime charged, or might be used by the prisoner in effecting his escape, is subject to garnishment in the hands of the officer, notwithstanding Gen. Laws 1909, c. 354, § 30, providing that such property shall be subject to the order of the court, in the absence of collusion between creditors and officers.—*Fitzgerald v. Nickerson, R. I.*, 113 Atl. 290.

31. **Husband and Wife**—Separate Property.—Where a broker, when he secured husband and wife's contract to sell a lot, knew that it was then homestead and her separate property, the husband, who, although his wife refused to convey, was ready and willing to make conveyance as far as he could, was not liable in damages

to the broker for his wife's failure to carry out his undertaking.—*Collett v. Harris*, Tex., 229 S. W. 885.

32.—**Unenforceable Note.**—Where a husband executes a promissory note or promises to pay his wife to resume the performance of her marital duties, where she has abandoned the same, or to continue their performance, where she is threatening such abandonment, the note or agreement is without consideration and is not enforceable against the husband or his estate, unless at the time of the execution of said instrument or the making of such promise the wife was absolved from the discharge of such marital duties by reason of the wrongful conduct of the husband.—*Bowers v. Alexandria Bank, Ind.*, 130 N. E. 808.

33.—**Injunction**—Interfering with Lease.—Where hotel company, having been enjoined from interfering with lease of barber to whom it had given the exclusive right to operate barber shop in the hotel, leased a room in the hotel to another barber, a petition by the holder of the prior lease to restrain the hotel company from permitting another barber shop to be maintained in the hotel, and to restrain the other barber from operating his shop in the hotel, was properly filed in the action in which the prior injunction was granted, instead of by original bill in separate proceeding.—*Belkedere Hotel Co. v. Williams*, Md., 113 Atl. 335.

34.—**Insurance**—"Confined to Bed."—The provision of an industrial insurance policy for payment of sick benefits when insured is necessarily confined to bed does not mean that insured should be confined to her bed all of the time, but should be bedridden in a substantial sense, and insurer cannot escape paying sick benefits because insurer could not lie in bed owing to a bad heart.—*North v. National Life & Accident Ins. Co. of Nashville*, Tenn., Mo., 229 S. W. 298.

35.—**Delivery of Policy.**—Where an insurance company executed a policy and sent it to an agent in this state to be delivered when the insured furnished a health certificate by one of its examining physicians, but no such provisions were in the policy, but in a letter of instructions, and the agent delivered the policy without complying with the instructions, the delivery by the agent is the act of the company, under § 2615, Code 1906 (§ 5078, Hemingway's Code), and the policy is valid in the hands of the insured or his beneficiary, though no health certificate was furnished the agent or the company.—*Mutual Life Ins. Co. v. Vaughan*, Miss., 88 So. 11.

36.—**Delivery of Policy.**—In an action to recover on an insurance policy, the fact of delivery or nondelivery is an affirmative defense, and plaintiff, introducing the policy and proving the death of insured by external bodily injuries accidentally received, has made out a prima facie case.—*Lafferty v. Kansas City Casualty Co.*, Mo., 229 S. W. 750.

37.—**Mutual Mistake.**—In respect to correcting a mutual mistake in reducing a contract of insurance to writing, a mutual insurance company is bound by the rules of equity and the principles of law applicable to other corporations and individuals.—*Central Granaries Co. v. Nebraska Lumbermen's Mut. Ins. Ass'n*, Neb., 182 N. W. 582.

38.—**Intoxicating Liquors**—Admissibility of Evidence.—In a prosecution for the making of whisky, testimony of witness, to the effect that he had been to the place in question before, and found some beer there, was admissible in evidence, but reference by the witness to any other time he had been to the place in question prior to the time it was alleged defendant was found making whisky was not admissible, being relevant to show a preparation on the part of somebody to distill liquor and to identify the place at which the liquor was made.—*Dozier v. State*, Ala., 88 So. 54.

39.—**Possession for Unlawful Purpose.**—Mere finding of a large amount of wine in one's residence did not indicate an intention to keep such wine for sale, under Prohibition Act, §§ 5, 35.—*Burzo v. State*, Ind., 130 N. E. 796.

40.—**State Statutes.**—The statutes of the state in regard to the manufacture, sale and transportation of intoxicating liquors for beverage purposes were not repealed by the Eighteenth Amendment to the United States Constitution, whenever the enforcement of such legis-

lation would aid in carrying into effect the provisions of the amendment.—*State v. Hartley*, S. C., 106 S. E. 766.

41.—**Landlord and Tenant**—Agreed Service.—Laws N. Y. 1920, c. 951, making it a misdemeanor for a lessor or any agent or janitor intentionally to fail to furnish such water, heat, light, elevator, telephone, or other service as may be required by the terms of the lease and necessary to the proper or customary use of the building, does not violate Const. Amend. 13, since the services in question are not strictly personal services, but are analogous to services that under the old law might issue out of or be attached to land.—*Marcus Brown Holding Co. v. Feldman*, U. S. S. C., 41 Sup. Ct. 465.

42.—**Damage to Crops.**—It is not error to refuse an instruction that a lessee of meadow and pasture land could not recover damages for injury to an ensuing crop of grass, where there is competent evidence to support the lessee's claim of injury thereto.—*Otey v. Midland Valley R. Co.*, Kan., 197 Pac. 203.

43.—**Lien on Crops.**—Though a landlord allowed his tenant to sell crops and deposit the rent to his credit, thus waiving his lien as to purchasers, the lien given by *Vernon's Sayles' Ann. Civ. St.* 1914, art. 5475 et seq., as amended by Laws 1915, c. 38, was not waived with respect to a judgment creditor of the tenant who levied on unsold crops.—*Jarrell-Evans Dry Goods Co. v. Allen*, Tex., 229 S. W. 920.

44.—**Notice.**—Where the petition of the landlord for removal of his tenant alleges all the facts required by Code Civ. Proc., § 2231, to give the court jurisdiction of the proceedings, the omission to allege that the landlord had given the tenant the notice required by Laws 1882, c. 303, as amended by Laws 1920, c. 209, does not defeat the court's jurisdiction, where it was alleged that the tenant notified the landlord he would surrender the premises at the end of the term, since the latter statute does not give the court any new jurisdiction, but merely states a condition precedent for the benefit of the tenant, which he waived by giving notice of his intention to remove.—*A. N. P. Realty Co. v. Tunick*, N. Y., 182 N. Y. S. 437.

45.—**Ratification of Contract.**—No ratification of the contract of tenancy can debar the tenant from interposing, under Laws 1920, cc. 944, 945, that the rent is unreasonable and oppressive.—*B. & S. Realty Corporation v. Wald*, N. Y., 187 N. Y. S. 436.

46.—**Reasonable Rental.**—A tenant is not entitled to a lower rental than would otherwise be reasonable merely because a landlord will obtain a fair return upon his whole investment through higher rates paid by other tenants, since no rental can be considered "reasonable" which is less than the amount which would be fixed by ordinary competition, and, in addition is less than would afford the landlord a fair return upon his investment, if applied to all the apartments in the same house.—*Elvira Realty Co. v. Bracegirdle*, N. Y., 187 N. Y. S. 519.

47.—**Libel and Slander**—Counter-Claims.—Alleged slanders of defendant by plaintiff, whether spoken before or after the libel on which the complaint is based, do not constitute a justification for the libel, or amount to a defense to the action therefor.—*Udovichky v. Bacheff*, N. Y., 187 N. Y. S. 474.

48.—**Licenses**—Shares of Unincorporated Association.—Shares into which capital of unincorporated association, organized under the common law, having a declaration of trust in favor of the association reported in the office of the register of deeds of the county, and for which certificates were issued, held "stock" within the Blue Sky Law, the association being an "investment company" within § 2, defining an "investment company" as any "person, corporation, copartnership, company, or association" not specifically exempted, organized, or to be organized, whether incorporated or unincorporated, which sells or negotiates for the sale of any stocks, bonds, or other securities issued by such person, corporation, copartnership, company, or association.—*People v. Clum*, Mich., 182 N. W. 136.

49.—**Literary**—Property Same as Other Personality.—An author has the same rights in his work as the owner of other personality, and may sell the same outright, or dispose of it on such conditions or with such restrictions as he might

any other property.—*Maurel v. Smith*, U. S. C. C. A., 271 Fed. 211.

50. **Master and Servant**—Assumption of Risk.—It cannot be said as a matter of law that the danger of a belt with worn and frayed edges catching the bar with which an employee was shifting the belt, because of defects in a shifting device, and knocking the employee down, was apparent, and that the employee was aware of and appreciated the danger; and hence a complaint was not demurrable as showing assumption of risk.—*Grandpre v. Chicago, M. & St. P. Ry. Co.*, S. D., 182 N. W. 527.

51. **Contributory Negligence**.—In a coal miner's action for injuries from fall of rock from the roof of the mine after having been employed therein for less than two hours, where there was evidence that he was inexperienced, and that it was difficult for an inexperienced person to detect the dangerous character of the formation of the roof, the question of contributory negligence was for the jury.—*Sullivan v. North Pratt Coal Co., Ala.*, 87 So. 805.

52. **Course of Employment**.—Where a lumber company owned all the property around its sawmill and an employee riding homeward from his work on his velocipede on the company's tramroad was killed by a train at a point one and one-half miles from the mill, held, that the remedy of his widow was not limited to proceeding under the Workmen's Compensation Act.—*Kirby Lumber Co. v. Scurlock, Tex.*, 229 S. W. 975.

53. **Monopolies**—Price Fixing.—That a manufacturer indicated a sales plan to wholesalers and jobbers, which fixed a price below which the wholesalers and jobbers were not to sell, and called this particular feature of the plan to the attention of the wholesalers and jobbers on many different occasions, and that the great majority of the wholesalers and jobbers expressed no dissent from the plan, but actually co-operated in carrying it out by selling at the prices named, did not alone establish an agreement or combination to maintain resale prices, forbidden by the Sherman Act.—*Frey & Son v. Cudahy Packing Co., U. S. S. C.*, 41 Sup. Ct. 451.

54. **Municipal Corporations**—Depression in Street.—Those using highways are bound to note where they are going, and, if they fail to do so, are barred from recovery of damages for injuries sustained, though negligence on the part of the municipality appears.—*Montgomery v. City of Philadelphia, Pa.*, 113 Atl. 357.

55. **Icy Sidewalk**.—Though a traveler knew that a sidewalk was icy and dangerous to pedestrians, she is not by law required to avoid use of the walk, but is merely bound to use reasonable care proportionate to the danger, so a pedestrian cannot be deemed negligent because she used an icy-covered sidewalk instead of a path beside it; there being no evidence as to the condition of the path.—*City of Linton v. Maddox, Ind.*, 130 N. E. 810.

56. **Legislative Grant**.—The Legislature has power to grant to the city of New York the right to operate a railroad over the Williamsburg Bridge; such a grant not being violative of Const. art. 8, § 10, providing no city shall be allowed to incur any indebtedness except for city purposes.—*City of New York v. Brooklyn City R. Co., N. Y.*, 187 N. Y. S. 523.

57. **Lighting Streets**.—In lighting its streets a municipality is not exercising its governmental functions, so as to be free from liability to those injured by coming in contact with wires used for lighting purposes.—*Stedwell v. City of Chicago, Ill.*, 130 N. E. 729.

58. **Partnership**—Joint Tort-Feasors.—Where a member of a firm of druggists negligently sold plaintiff poison, instead of a harmless medicine, all of the partners in the firm were liable as joint tort-feasors, and plaintiff could elect to sue one or all, and so, where all were joined, an amendment whereby the name of the firm and one partner were stricken, but which left in the allegations as to the firm, cannot be questioned, for the allegations as to partnership showed the status and relation of the other parties proceeded against.—*Tucker v. Graves, Ala.*, 88 So. 40.

59. **Principal and Agent**—Termination of Contract.—Where a contract for the sale of patterns by a merchant was terminated as to the requirements for keeping patterns in stock by

notice given in accordance with the terms thereof, though the merchant was not required to return unsold patterns until six months thereafter, the provision in the contract forbidding the merchant from handling patterns of other makers was terminated by the notice.—*Butterick Pub. Co. v. Frederick Loeser & Co., N. Y.*, 187 N. Y. S. 500.

60. **Railroads**—Loss of Easement.—Where a railroad company by nonuser had lost its easement of right-of-way, it has no rights to be protected and enforced by the equitable remedy of injunction.—*Boyleston v. Seaboard Air Line Ry. Co., S. C.*, 106 S. E. 777.

61. **Sales**—Loss of Profits.—In an action for damages brought by a purchaser of a tractor against the seller for conversion thereof by the latter, on the purchaser's failure to make payment after he had plowed only part of his potato land, the conversion causing a delay in plowing the remainder, whereby the crops were lost, consisting of high grade potatoes, damages for the loss of anticipated profits held not recoverable as the ordinary, usual, or commonly to be expected consequences of the tort.—*Cannon v. Oregon Moline Plow Co., Wash.*, 197 Pac. 33.

62. **Special Damages**.—Special damages, such as expected profits from a resale, may be recovered, if at the time of making the contract the buyer has an existing contract of resale and the purchase is made for the purpose of filling it and the goods cannot be otherwise procured and the seller is apprised of these facts when the contract is made.—*Dreyer Commission Co. v. Fruen Cereal Co., Minn.*, 182 N. W. 520.

63. **Specific Performance**—Abandonment of Contract.—The acquiescence by complainant in the sale by defendant company of a tract of land, which it was developing by means of canals and ditches, including a part of the tract which complainant had contracted to purchase, thereby becoming a member of the company, when an overflow from the Mississippi destroyed the drainage works, held an abandonment of his contract, and to preclude his afterwards maintaining a suit for its specific enforcement.—*Eddy v. St. Charles Land Co., U. S. C. C. A.*, 271 Fed. 254.

64. **Street Railroads**—Contributory Negligence.—A wagon driver, who saw a street car approaching a block and a half away, and who slowly drove parallel to the track without looking back for a distance of 50 feet, and then without signal to motorman and without glancing back to ascertain proximity of car abruptly turned upon track to cross the street, held contributorily negligent.—*Duford v. City of Seattle, Wash.*, 197 Pac. 14.

65. **Taxation**—"Income" Defined.—An income tax is an excise and not a tax on property within the meaning of the requirement of § 112 of the state constitution of 1890 that property shall be taxed in proportion to its value and shall be assessed for taxes under general laws and by uniform rules according to its true value.—*Hattiesburg Grocery Co. v. Robertson, Miss.*, 88 So. 4.

66. **Telegraphs and Telephones**—Merger.—A telephone company, incorporated under the act for chartering telegraph companies, which desires to take advantage of Act July 22, 1919, providing for the incorporation of telephone companies and to secure from the Public Service Commission permission to merge with a connecting telephone company, should, before applying to the Public Service Commission for the certificate of public importance, obtain from the court of common pleas a decree authorizing it to surrender its rights as telegraph company as provided by Act April 9, 1856.—*Shaffer v. Public Service Commission, Pa.*, 113 Atl. 367.

67. **Wills**—Payment for Services.—If the value of real estate agreed by decedent to be given to plaintiff housekeeper for making a home for him and his brother and the value of plaintiff's housekeeper's services were treated by the parties in making the contract as commensurate, plaintiff housekeeper's recovery, where defendant administratrix sets up the statute prohibiting oral agreements to make a will, can be had solely on the ground that, the contract having been repudiated by defendant administratrix, plaintiff is entitled only to payment for services actually rendered.—*Donovan v. Walsh, Mass.*, 130 N. E. 841.

Central Law Journal.

St. Louis, Mo., August 5, 1921.

THE SENATE AND OUR FOREIGN RELATIONS.

The passions of the recent political campaign have sufficiently cooled, it is believed, to permit a discussion of the reasons for the controversy between President Wilson and the Senate that resulted in some respects, not only in disaster to the personal ambitions of some of the participants, but in detriment to the national interests as well.

It would be untrue to charge the result to partisan politics, or on the other hand to say that the President's obstinacy was solely to blame. Anyone familiar with our country's history is well aware of the fact that such encounters between the President and the Senate have occurred not infrequently in the past and that very often these disputes have happened even when the President belonged to the party in power in the Senate. On the question of obstinacy, it may be a question whether the presidents who have had such controversies with the Senate would be willing to admit that all the stubbornness was on one side. We believe that, on the other hand, a careful study of such cases will show that neither side is to be blamed more than the other; that the blame lies rather with the framers of the Constitution, who required all treaties to be made by the President "by and with the advice and consent of the Senate" without indicating whether such consent is to be obtained prior or subsequent to the negotiations for the treaty, or by failure of our chief executives properly to construe the word, "advice."

John Hay, one of the greatest Secretaries of State, declared in his diary that "a treaty entering the Senate is like a bull

going into the arena; no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive." Hay negotiated some of the greatest treaties ever made by this country and it was one of the sorest disappointments of his life to have many of these treaties mutilated by Senate amendments, and many of the advantages which he had sought to secure defeated by Senate vetoes. He expressed his views of the Senate's attitude toward treaties in the following caustic criticism: "The fact that a treaty gives to this country a great and lasting advantage," says Mr. Hay, "seems to weigh nothing whatever in the minds of about half the senators. Personal interest, personal spites and a contingent chance of petty political advantage are the only motives that cut any ice at present." (Thayer, *Life & Letters of John Hay*, II, p. 274.)

President Roosevelt had the same difficulty with a Republican Senate over many of his treaties. When the Senate refused to ratify the San Domingo treaty, Roosevelt, with characteristic audacity, put the treaty into effect as a personal agreement of the executive. He said "The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo. But the Constitution did not forbid my doing what I did. I put the agreement into effect and I continued its execution for two years before the Senate acted, and I would have continued it until the end of my term, if necessary, without any action by Congress." Cleveland had the same trouble in 1897 with the Senate, which rejected the Olney-Pauncefote Arbitration Treaty. Taft also had a controversy with the Senate over his Arbitrative Treaties of 1911. The Senate attached such objectionable conditions to its consent to the ratification of the treaty that President Taft refused to ratify it.

George Washington is probably as much responsible for the present situa-

tion as any other one individual. He had the opportunity to create a wise precedent, but allowed his temper to get away with his judgment and the opportunity was lost. Washington believed, as many believe today, that the consent required by the Constitution should be given in the course of the negotiations and not after a treaty had been completed and signed by the other party. So it was the policy of Washington at the first to discuss the terms of a treaty with the Senate in executive session. He did what a prime minister of France or England would do today, namely, obtain the sense of his co-partners in foreign affairs before he committed himself. But the dignity of the presidential office did not seem to comport with the rough and tumble tactics required of an active Prime Minister and so Washington discontinued the practice after several humiliating experiences in debating the terms of a treaty with the members of the Senate. The upshot of Washington's experience in trying to secure the prior consent of the Senate is given by John Quincy Adams in his diary. He says:

"Mr. Crawford told the story of President Washington having at an early period of his administration gone to the Senate with a project of a treaty to be negotiated, and been present at their deliberations upon it. They debated it and proposed alterations, so that when Washington left the Senate-chamber he said he would be damned if he ever went there again. And ever since that time treaties have been negotiated by the Executive *before* submitting them to the consideration of the Senate."

The difficulty with our form of government is that while we have a foreign secretary, we have no prime minister who is the responsible head of the government, and at the same time, the leader of the majority party in the legislative body. Our prime minister is necessarily the President and the dignity of the office seems to forbid that he should engage in personal debate in the Senate in securing

the legislative assent to a treaty. Moreover, he is not responsible to the legislative body and therefore is not always in accord with the views of the prevailing majority. His prerogatives are not affected by a change in the party majority of the Senate and therefore, not infrequently, it becomes his duty to direct the foreign affairs of the country with the advice and consent of a hostile and personally antagonistic Senate. In such cases it is needless to argue that the hands of the government are completely tied. The Senate cannot initiate a treaty, but may refuse to ratify. The President can negotiate a treaty but cannot execute it.

There should be some means devised by which more effective co-operation may be secured between the President and the Senate in reference to foreign affairs. One plan suggested, however, is wholly out of the question, namely: to make the President supreme in the treaty-making power. While this has the advantage of enabling the chief executive to reach prompt and possibly more effective agreements with foreign powers, it would endanger that delicate balance of power that must exist in a democracy between the three distinct agencies of government.

On the other hand, the power cannot be given to the Senate alone, as too many cooks would spoil the broth. In such a delicate undertaking as that of devising the terms of an agreement by which two contracting parties seeking different results must reach a common basis of agreement and where there must be frequent discussions and some concessions made; in such cases, we repeat, there must be one or at least only a few minds in direct control of the negotiations. If the Senate allowed the Chairman of its Foreign Relations Committee to negotiate a treaty, he would to all intents and purposes become the responsible head of the government so far as foreign affairs were concerned, and the government would have two heads, one for foreign affairs

and one for domestic affairs—a political monstrosity.

The suggestion that we change our form of government to the parliamentary form with a responsible head, responsible directly to Congress and who would change with every variation in the party majority is also, without merit. In such case the President would be a mere figure-head, as he is in France, and the Premier or legislative leader, would become the government. This scheme would make party government supreme. While it has many apparent advantages over our present system, yet, on the other hand, it would make Congress the supreme power in the country, since the legislature, by means of its absolute control over the responsible head of the government, would execute the laws and even construe its own powers, since the judges themselves would be subservient to this power. No such absolute power can safely be conceded to any man or group of men under a democratic form of government.

It seems to us that Washington himself set a bad precedent and that it is only necessary to reverse this precedent. However humiliating it may be for a chief executive to come to the Senate for its "advice" before negotiating a treaty, we believe that it was the intention of the framers of the Constitution that he should do so. And the wisdom of this is evident. If the President, about to negotiate a treaty, should first request the chairman of the Senate Committee on Foreign Relations to collaborate in settling the terms of the convention, the problem would necessarily be solved, since the treaty would, when completed, be the treaty of the Senate and the President. The Chairman of the Senate Committee on Foreign Relations would necessarily represent the party in power in the Senate and would, as he proceeded, take into his confidence the leaders of his party or, if he did not wish to make it a party matter, of both

parties. In this way the Senate would be committed in advance to a treaty and the objectionable veto power rendered innoxious.

It is quite likely that many senators would seriously object to thus depriving themselves of the "big stick" they are able to hold over the head of a president and would refuse their "advice" or collaboration in forming a treaty. But if the President declined to move without the express suggestion or "advice" of the Senate Committee on Foreign Relations, the Senate would soon capitulate. This arrangement, it is admitted, would practically make the Chairman of the Senate Committee on Foreign Affairs the equal responsible head of the government in foreign affairs. But this would not weaken the President's prerogatives, as he has still the power to prevent any treaty going into effect without his consent. It simply requires him to come into an agreement with the Senate majority before agreeing to the terms of any foreign engagement. No one doubts that if President Wilson and Senator Lodge had been present at Versailles and had agreed in advance on the terms of the treaty that the present embarrassing situation would never have resulted.

We believe that in the future the unfortunate precedent set by Washington should be ignored and the "advice," as well as the "consent," of the Senate secured in advance of the negotiation of a treaty. In 1830, President Jackson sought the "advice" of the Senate on an Indian treaty, and in seeking this advice prior to negotiating the treaty, apologized "for departing from a long and for many years an unbroken usage in similar cases." No such apology was necessary. Jackson proceeded wisely and in conformity with the Constitution and had no trouble securing the "consent" of the Senate to a treaty, the terms of which that body had already "advised" the President to accept.

NOTES OF IMPORTANT DECISIONS.

POWER OF MUNICIPALITY TO REGULATE RATES NULLIFIES THE POWER TO CONTRACT CONCERNING RATES. — "One cannot eat his apple and have it too," is a wise saw that finds abundant application in law as in the ordinary affairs of life. In a recent case the Supreme Court of the United States holds that where a city has the power to contract with public service companies concerning rates and later is given the power to fix and regulate such rates, independent of any contract, that the contract provision as to rates is not binding on the company which accepted it and that it had a right to ask the municipality to increase the rate on the ground that the contract rate was confiscatory. *Southern Iowa Electric Co. v. City of Chariton*, 41 Sup. Ct. 400.

It is ridiculous to contend, as have a number of cities in Iowa, for instance, that they can exercise the new power to fix and regulate rates, independent of contract, and at the same time enjoy the right to hold a public service company to a rate stipulated in the franchise accepted by the company. The obligation is clearly unilateral and is not an enforceable compact. This thought was forcefully expressed by the Supreme Court of Iowa in the case of *Ottumwa Railway & Light Company v. City of Ottumwa*, 178 N. W. 905, where the Court construes the effect of a power conferred on municipalities to regulate rates of public service companies. The Court said:

"That statute in positive terms forbids any abridgment of the right to regulate and fix charges of service corporations named in the statute, either by ordinance, resolution, or contract. No one would now contend, in the teeth of the statute prohibition, that there can be a valid contract fixing permanent rates. As to corporations named in that statute we have held repeatedly that there can be no contracting that rates fixed for service shall not be changed. See *Tipton v. Light Co.*, 176 Iowa 224, 157 N. W. 844; *Selkirk v. Gas Co.*, 176 N. W. 301. And see *San Antonio Co. v. City* (D. C.), 257 Fed. 467. To like effect is *Iowa Co. v. Jones*, 182 Iowa 982, 164 N. W. 780. And in the last case it is held that the fixing of maximum rates in a franchise ordinance is therefore not a contract that such rates may not be changed before the time stated in such ordinance has lapsed, and that approval by the electors of rates in the franchise is merely an approval of the rates fixed by the franchise, as rates temporarily settled, with the understand-

ing that the same might be changed either upward or downward."

A municipality desiring to fix the service charges of public service corporations to whom it grants a franchise must rely either upon the power to contract or upon the power to regulate. These powers are antagonistic and cannot both exist in the same body corporate at the same time. But either power is legal and certain advantages attach to each method of dealing with public service corporations and it is necessary to make a choice of these benefits. On the question of the legality of these powers, the Supreme Court, through Chief Justice White, collects the authorities and states the rules applicable thereto with clearness and exactness. The learned Justice said:

"Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations, *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 17, 29 Sup. Ct. 148, 53 L. Ed. 371; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Minnesota Rate Cases*, 230 U. S. 352, 434, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244; *Denver v. Denver Union Water Co.*, 246 U. S. 178, 194, 38 Sup. Ct. 278, 62 L. Ed. 649; and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and therefore the question of whether such rates are confiscatory becomes immaterial, *Freeport Water Co. v. Freeport*, 180 U. S. 587, 593, 21 Sup. Ct. 493, 45 L. Ed. 679; *Detroit v. Detroit City Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 437, 23 Sup. Ct. 531, 47 L. Ed. 887; *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 519, 24 Sup. Ct. 756, 48 L. Ed. 1102; *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. Ed. 176; *Minneapolis v. Minneapolis Street Ry. Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259; *Columbus Ry., Power & Light Co. v. City of Columbus*, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648."

THE FEDERAL COURTS AND LIQUOR PROSECUTIONS.

The friends of law enforcement are in full accord with any movement which has its object the better administration of the law of the United States. Complaint is being made of the congestion of cases upon the dockets of some of the Federal Courts. One of the constitutional guarantees is the right to a speedy and public trial. Speed, sureness and justice in the execution of the laws by the courts engenders respect for law and insures stability of government. Any practical measure which will better secure this end through the prompt punishment of the guilty and the equally prompt vindication of the innocent should have the active support of all loyal citizens. On the other hand, however, the friends of the Eighteenth Amendment have no sympathy with the purposes or sentiments of those advocates of the reform of the judicial machinery of the government who seek to differentiate in dignity and importance between the various provisions of the Constitution of the United States and who term offenses against the Eighteenth Amendment as "petty" and unworthy the time and beneath the dignity of the Federal Courts. They are offenses against the Constitution of the United States and as such are justiciable before the Federal Courts. The mere fact that such cases are more numerous at this time than some others does not justify the position that they are a less offense against the Constitution.

In some jurisdictions it is evident that some form of relief of the congestion of the court dockets is desirable for the expeditious administration of the law. The principal remedy suggested is to confer original jurisdiction upon United States Commissioners for the trial of cases not infamous.

In the consideration of proposed remedies, it is essential to bear in mind the language of Article III of the Constitution of the United States, the source from which

Congress must derive its power in creating judicial machinery.

"The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Under this section there can be no doubt of the power of Congress to create inferior courts. It may make the present United States Commissioners courts, but when such inferior courts are created they become a part of the judicial power of the United States governed by the other provisions of Article III, Section 1, which requires that they shall hold office during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuances in office. If Congress should adopt the proposed suggestion and make the United States Commissioners a part of the judiciary they would hold office for life, or during good behavior, and would seemingly have to be placed upon a salary basis which could never be lowered though future conditions might greatly reduce the amount of work to be done.

Congress has, in some instances, given to United States Court Commissioners limited trial jurisdiction in certain cases, such as provided in sections of the United States compiled statutes of 1918.¹ It has also been held that the conferring of such jurisdiction upon them did not make them a part of the judicial system of the United States within the meaning of Act III of the Constitution of the United States, but on examination of the instances in which this power was conferred, will disclose that it was in the government of the territories of the United States by Commissioners of the territorial courts. There is a clear distinction between the power which Congress has in passing

(1) §§ 5194, 5248 Fed. 5266, 5227 Fed. and 5230 Fed.

legislation affecting territories subject to the United States and the creation of courts in these territories, and in the exercise of the power to create courts under Article III of the Constitution. Chief Justice Marshall pointed out the distinction in an early case as follows:

"The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the execution of these general powers which that body possesses over the territories of the United States (Article IV, Section II) * * *."

"In legislation for them, Congress exercises the combined powers of the general and of a state government."²

Another instance in which Congress has created legislative courts in virtue of the general right of sovereignty which exists in the government is in the matter of consular courts. Express authority has been conferred on consuls and ministers to exercise judicial functions in foreign countries.³ Such courts are not a part of the judicial power of the government within the purview of Article III of the Constitution and are not subject therefore to the limitation of that article requiring that the tenure of office shall be during good behavior. In this case, as in the case of territorial courts, the power exercised by Congress in their creation is found in some other section of the Constitution. Consular courts are the result of treaties, and in their creation Congress is acting under the treaty-making power conferred by the Constitution rather than under the section providing for the establishment of the judicial system.

But when Congress seeks to establish a judicial system for the enforcement of the criminal laws of the United States where no other section of the Constitution is applicable, the courts which are established, by whatever name called, must be created under Article III and subject to the limitations imposed by that Article, such as the re-

quirement of tenure during good behavior. This at once suggests several objections to the proposal to give Commissioners trial jurisdiction.

Commissioners given the jurisdiction would become part of the judicial system, and as such would hold office for life or during good behavior. The present commissioners are not selected with particular reference to their knowledge of the law, as under the existing system little legal knowledge is required. They are largely ministerial officers appointed by the courts as adjuncts for the dispatch of business and hold office for a term of four years subject to removal at any time for cause by the court which appointed. This tends to efficiency, as the court possesses the power to remove any incompetent and inefficient commissioner.

To pass an act which conferred trial jurisdiction upon existing Commissioners would be to create an entire new system of courts, many of whom would not possess the requisite legal knowledge essential to construe the questions of law which would arise and fasten such judicial misfits upon our judicial system for life. It would be almost impossible to remove such an incompetent commissioner so long as he did not misconduct himself in office, once his status as a judicial officer were established by an act of Congress. What is here said is in no way intended as a reflection upon the present court commissioners. Most of them are as efficient and faithful in the discharge of their duties as any other group of public officials; but they have been appointed to perform one kind of duty; to suddenly impose a new and entirely different function upon them would be as manifestly unfair to them as it would be undesirable to the people as a governmental policy.

To confer upon the United States Commissioners a trial jurisdiction and make of them a part of the judicial system would require a change in the method of compensating them. Commissioners at present derive their compensation from fees secured

(2) *American and Ocean Insurance Co. v. Bales of Cotton*, 1 Peters 511; 7 L. Ed. 242.

(3) See §§ 4083, 4084, 4085, R. S. et seq.

through the discharge of their official duties. These fees are now generally taxed against the defendants in criminal prosecutions. If the Commissioners are made a part of the judicial system they would be subject to the limitations of Article III, Section 1, which seemingly requires that they be placed upon a salary basis. This could not be reduced as long as the system existed, though the work might be materially lessened in the future. The proposed change would therefore involve a large additional financial cost to the government.

But aside from the question of whether Congress can confer trial jurisdiction, with limited right of appeal, upon United States Commissioners without thereby making them a part of the judicial system of the government as contemplated by Article III of the Constitution, there are certain practical difficulties which would arise from conferring such power upon commissioners which greatly outweigh the benefits to be derived.

The present United States Commissioners in the discharge of the duties now imposed upon them by law do not have to be trained in the law. If Commissioners are given trial jurisdiction many new Commissioners would have to be appointed.

To secure the type of men necessary to discharge the duties of trial commissioner, a much higher rate of compensation would have to be provided. This would add greatly to the expense of maintenance of the criminal machinery of the government. The additional cost would not be represented along by the additional witness fees and other incurred by two trials where appeal was taken, instead of one, as at present.

In the various districts court commissioners are scattered throughout for the convenience of business (for instance, Montana has, I am told by the Division of Accounts, about 150); they are usually lawyers who conduct the Government's business in connection with their own, paying their own rent and furnishing their own supplies. (Last year we had about 1000

Commissioners in all.) If each is given trial jurisdiction, then we must have trials going on all over the district in a dozen places at a time, perhaps, with as many trial juries, prosecuting attorneys and subordinate court officials, etc. Prohibition agents would be wanted in several of these places at the same time, producing great confusion. (This now occurs in Commissioner's hearings rather frequently.)

Additional prosecuting officers would be necessary. The interests of the people require that they be represented from the inception of the prosecution. The defendants are nearly always represented by counsel in hearings before commissioners at the present time when the commissions only discharge the duties of examining magistrates. If the commissioners were given trial jurisdiction and each case were gone into fully the government would have to be ably represented at such trials, otherwise many important cases would be lost and on appeals the district attorney would not have the full comprehensive knowledge of the proceedings in the inferior court essential to successful prosecution. It would be impossible in many instances for district attorneys to attend such trials before the commissioner and even if it were possible, some compensation for the additional work would have to be provided. If, under the present system, a sufficient number of assistants could be assured in the offices of the United States attorneys so that at least one in each office could be especially assigned to prohibition matters and held responsible for them, a more careful sifting of cases could and should be had before proceedings are commenced. Under the present system, prohibition agents sometimes bring cases before the commissioners which are not legally sound. Such cases should not be started, and if there were assistants enough so that each case could be weighed beforehand, many could be and would be eliminated that now clog the calendars.

Also an additional number of marshals, deputy marshals and deputy clerks would

be required to conduct these trials; in some places commissioners would be busy only part of the time, while where cases are tried in a regular court, two or three cases per day can often be tried; they can be kept moving faster in a regular court, for if one is not ready, another case can be substituted. A confusion in the keeping and filing of records would also result; and records of convictions should be easily available so that second offenders could be easily detected.

Conferring trial jurisdiction upon commissioners would not lessen the number of cases upon the dockets of the district courts to a sufficient extent to justify the increased costs. Practically every person convicted would appeal to the district court. As a rule violators of the prohibition law have sufficient means to perfect an appeal. The result would be the district court would ultimately try the offender.

Every added chance afforded the violator of the law weakens the chances of the government to convict. Repeated trials caused the government to expose its case and afford further opportunity for the miscarriage of justice. The commissioners court would be an added and unnecessary fifth wheel to our judicial system.

Additional delays, the very thing which is desired to be avoided, would be occasioned. Defendants would be entitled to continuances before the commissioner, on account of the absence of witnesses and for many other reasons, and the same delays would operate upon appeal. Every additional court which is required to pass upon a case before final adjudication means delay in the administration of justice. No step should be taken which tends to add to the proverbial delays of the law.

To create inferior Federal courts with jurisdiction to try offenses under the laws of the United States which are not infamous, the judges of which courts would in all probability be men of small legal ability would tend to create a loss of that high esteem and respect which the Federal courts have so deservedly enjoyed since the insti-

tution of our government. The mere press of business in the courts should be seized upon as a pretext to establish an adjunct to our judicial system tending to lower its dignity.

Prohibition alone is not responsible for the clogging of the wheels of justice; the war litigation had them pretty well clogged before prohibition and there should not be more district judges in many districts to handle the regular business; these increases cannot be avoided by creating commissioners' courts.

The crowded condition of the dockets in some of the Federal courts is due in part to prosecutions instituted under the National Prohibition Act, passed to enforce the Eighteenth Amendment. This law has but recently been put into operation and is the subject of contest and judicial construction necessarily incident to as revolutionary a piece of legislation, representing as it does a complete change in governmental policy. The Eighteenth Amendment contemplates concurrent enforcement by the State and Federal governments. As the states adopt enforcement codes, the burdens of enforcement upon the Federal government will be materially lessened and the number of cases in the Federal Courts proportionally reduced. Under these circumstances it would be bad policy to implant in the judicial system of our country a system of courts constituting a new departure from our established judicial machinery, especially when the necessity for such courts may very materially abate in the course of time.

In some instances the crowded condition of court dockets is in part due to no lack of present facilities, but to the neglect of district attorneys to avail themselves of existing provisions of law to expedite its administration. Thus, in many jurisdictions district attorneys file informations for violations of the National Prohibition Act. This obviates the necessity for action by a grand jury, saves repeated attendance of witnesses, cuts expenses and provides a prompt method of procuring a trial upon

the merits. In other jurisdictions this method is not followed as frequently as it might be. The result is delay and congestion of the docket of the court. Another provision of the National Prohibition Act which is not utilized to the extent it might be employed is the provision relative to injunctions. This affords a quick and effective method of disposing of many cases. Once the injunction is entered the people are protected from repeated violations from the same source. For upon a violation of its order of injunction the court possesses power to summarily punish the offender for contempt. These injunctions may be procured against individuals or against premises, where the law is being violated in certain instances. Another cause of congestion in some jurisdictions is the indulgence allowed by the courts to counsel in the preparation and trial of cases. Frequently counsel for the defendants impose upon the good nature of the courts. Cases are continued, others arise and there is an accumulation. Witnesses die or move to some new locality and the cases continue upon the docket. Sometimes it is possible for defendants to completely defeat prosecutions through repeated continuances.

Much can be accomplished through the full utilization of provisions of law to prevent crowded court dockets. It is recognized, however, that in some jurisdictions some supplemental relief is needed in order that the law may be enforced, but it is believed that this can better be accomplished through the creation of the necessary number of new judges under our present judicial system or through the creation of a criminal division of our present courts, rather than through the addition of any entirely new system. By providing for judges under our present system, there would be no surrender of the dignity of our Federal courts and the cost would not be as great in the final analysis as would result from the creation of a greater number of inferior courts from which the right of appeal was provided. Better qualified judges would be

secured and the better qualified the judge the more effectively will the law be enforced. A real enforcement of the law in any jurisdiction eventually results in fewer prosecutions.

WAYNE B. WHEELER.

Washington, D. C.

BANKS AND BANKING—LIABILITY OF STOCKHOLDERS.

BANK OF BLYTHEVILLE v. STATE.

(Supreme Court of Arkansas. May 9, 1921.)

230 S. W. 550.

Act April 9, 1891, p. 230, as amended by Act March 17, 1903, p. 142 (Crawford & Moses' Dig. §§ 2832, 2835), making stockholders of banks liable for public funds deposited therein, does not violate Const. art. 12, § 6, providing that the General Assembly may alter or revoke charters in such manner that no injustice be done the corporators, or Const. U. S. art. 1, § 10, prohibiting acts impairing existing obligations.

HUMPHREYS, J. Appellees instituted suit against appellants in the circuit court of Mississippi county, Chickasawba district, to recover \$41,293.15, alleged to be public moneys collected as taxes by D. H. Blackwood, the duly elected, qualified, and acting collector of Mississippi county and deposited by him in the Bank of Blytheville. A recovery was sought under the Act of April 9, 1891, p. 230, as amended by the Act of March 17, 1903, p. 142. The parts of the acts involved in this litigation are digested in Crawford & Moses' Digest as sections 2832 and 2835.

Appellants interposed the following defenses to the alleged cause of action: First, that the acts made the basis of the suit are unconstitutional and void; second, that the acts made the basis of the suit were repealed by Act No. 113 of the Acts of the General Assembly of the state of Arkansas for the year 1913, known as the General Banking Law of the state; third, that the collector did not make separate deposits of the alleged public funds in said bank; fourth, that the drainage funds to the amount of \$4,139.23 and the voluntary payment of \$2,000 for school purposes were not "public funds," as defined by section 2835 of Crawford & Moses' Digest.

The cause was submitted to the court, sitting as a jury, upon the pleadings and evidence, which resulted in a verdict and judgment

against appellants in the sum of \$41,293.15. The facts necessary to a determination of the issues involved on this appeal are, in substance, as follows:

The Bank of Blytheville, of which appellants were stockholders, was organized and the stock issued in the year 1900. It began business immediately, and continued to do business as a banking corporation until the 11th day of March, 1920, at which time, on account of insolvency, it was taken over by the state banking department under Act No. 113, Acts of the General Assembly of 1913. Prior to the time said bank was declared insolvent and taken over by the deputy state bank commissioner, D. H. Blackwood, the sheriff and ex-officio collector of Mississippi county, had deposited in said bank, to his credit as collector, \$41,293.15. The funds deposited were collections for the Chickasawba district of Mississippi county; \$1,139.23 of said amount was taxes collected for drainage districts 7, 9, 16 and 17; \$2,000 of said amount was a voluntary tax paid to the collector for the Blytheville special school district; the remainder of it was taxes collected for the state, county, schools, towns, and cities. Immediately after the bank commissioner assumed control of the bank, D. H. Blackwood, the collector, made a demand for the entire amount deposited, which demand for payment was by the bank refused.

Appellant's first insistence for reversal is that the Act of April 9, 1891, as amended by the Act of March 17, 1903, had the effect of increasing the burdens of the stockholders in the Blytheville Bank, who are appellants herein, in relation to public funds, which did an injustice to them, contrary to the inhibition of article No. 12, section No. 6, of the Constitution of the state of Arkansas, and which had the effect of impairing existing obligations, in violation of article No. 1, section No. 10, Constitution of the United States. It is true that, prior to the amendatory act of March 17, 1903, stockholders of a bank were not liable for public funds, and that the amendatory act made them liable for all public funds deposited therein, not paid to the person entitled to receive same on demand.

The constitutionality of the act in question has been before the Court frequently, and the Court is committed to the doctrine that the state has reserved its power in the Constitution to alter the charter of a corporation, limited only by the inhibition that "no injustice be done the corporators." *Leep v. Railway Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; *St. L., I. M. & S. Ry. Co. v. Paul*, 64

Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154; *Ozan Lumber Co. v. Biddie*, 87 Ark. 587, 113 S. W. 796; *Arkansas Stave Co. v. State*, 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (N. S.) 255, 140 Am. St. Rep. 103; *Davis, State Bank Com'r, v. Moore*, 130 Ark. 128, 197 S. W. 295. The reservation of this power, and the only limitation imposed, may be found in article No. 12, section No. 6, of the Constitution of 1874, which reads as follows:

"Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of any incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this state, in such manner, however, that no injustice may be done to the corporators."

Every objection urged by appellants against the constitutionality of the act finds an answer in the fact that a corporation accepts its charter powers subject to the reserved right in the charter whenever, in the opinion of the General Assembly, such revocation or alteration is for the protection of the citizens of the state, if done in such a manner that no injustice may be done to the corporators. Before an act revoking or changing the charter of a corporation can be declared unconstitutional, it must appear that the effect of the act is confiscatory of the stock or property of the corporation. In discussing a statute which imposed additional liabilities upon stockholders, and directly upon the question as to whether injustice had been done to the corporators by the passage of the statute, this court said, in *Davis, State Bank Com'r, v. Moore*, 130 Ark. 128, 197 S. W. 295:

"The statute, as we have already seen, does not impose an absolute liability on the shareholder of stock, nor does it compel the corporation or its stockholders to accept the provisions of the statute. It does not operate in any sense as a confiscation of the shares of stock, for the corporation may be wound up and in that way the property interest of the stockholders preserved, or an individual stockholder may sell his stock if he objects to the corporation continuing business under the new terms prescribed. It cannot be assumed that the new terms prescribed by the statute operate as an impairment or depreciation of the value of the stock, and that an objecting stockholder would be unable to dispose of his shares of stock at full value."

The appellants assail the statute before us on the further ground that no provision is contained in it for an acceptance of the change or alteration in the charter by the corporation or its stockholders. This can make no difference, because, as said before, it accepted its

original charter on condition that the state reserved the power to revoke or alter it, if the revocation or alteration did not have the effect of confiscating its property. An acceptance of the altered charter was clearly made by continuation in business after the change was made. The statute in question is not void as infringing upon either the Constitution of the state or of the United States. *Noble State Bank v. Haskell et al.*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1962, Ann. Cas. 1912A, 487; *Assaria State Bank v. Dolley*, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123; *Ramapo Water Co. v. New York*, 236 U. S. 579, 35 Sup. Ct. 442, 59 L. Ed. 731.

The judgment is affirmed, except as to the item of \$4,139.23, and, as to that item, it is reversed and dismissed, as against the stockholders.

NOTE.—*Validity of Statutes Imposing Liability on Stockholders of Bank.*—Statutes imposing individual liability upon stockholders for debts of bank have very generally been upheld. *Maxwell v. Thompson*, 186 N. Y. Supp. 208; *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295; *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601; *Saussy v. Liggett*, 75 Fla. 412, 78 So. 334; *Davis v. Branch*, 133 Ark. 417, 202 S. W. 705; *Hanson v. Soderberg*, Wash., 177 Pac. 827; *Miller v. Amoretti*, Wyo., 181 Pac. 420.

Such a statute is not objectionable on the ground that it is injurious to corporators of banks existing at its passage who held stock. *Maxwell v. Thompson*, 186 N. Y. Supp. 208.

The Arkansas statute was intended to have a retroactive operation, and to impose liability upon stockholders in a bank for all the bank's indebtedness, whether accruing before the act went into effect or thereafter. *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295.

The Mississippi act, increasing liability of stockholders of a bank to the extent of the par value of their stock, but at the same time guaranteeing payment of depositors by the state, cannot be said to do stockholders an injustice. *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601.

The Wyoming act applies as well to banking corporations existing at the time of its passage as to those formed thereafter.—*Miller v. Amoretti*, Wyo., 181 Pac. 420.

Such a law, being in derogation of the common law, should be strictly construed. *Skinner v. Sullivan*, 179 N. Y. Supp. 567; *Saussy v. Liggett*, 75 Fla. 412, 78 So. 334.

ITEMS OF PROFESSIONAL INTEREST.

THE CHIEF JUSTICE OF THE UNITED STATES.

In respect of dignity, of power and of responsibility, and, therefore, of honor, there is

no official position in all the wide world that may come to a man, either by inheritance or by appointment or by election, which is as exalted as the office which was made vacant by the death of former Chief Justice White.

The Supreme Court of the United States is the highest tribunal ever known in the history of nations. It is the most important of the three co-ordinate branches of the government, provided in that Constitution which Gladstone characterized as "the most wonderful work ever struck off at a given time by the brain and purpose of man." That Constitution is the fundamental law of our government which Bryce has termed "the first true federal state founded on a complete and scientific basis." In accordance with its constitutional powers the Congress has made the Federal Supreme Court to be composed of nine judges, of whom eight are "Justices of the Supreme Court," and a presiding judge who has the title of "Chief Justice of the United States." It is the highest office under a government whose superiority and efficiency have been demonstrated to be the nearest perfect in accomplishing the prime objects of government—that is, to safeguard the personal and property rights of the individual against arbitrary encroachment or oppression of tyrannical rule, whether exercised by a sovereign head or by an electorate.

* * *

The tenure of this office is limited only by that which limits the tenure of the most powerful sovereign—death itself. Its function is to guide, but not control, the procedure and to participate in the judgments of that court which is the keystone of our government and which is, in the words of Rufus Choate:

"Appropriated to justice, to security, to reason, to restraint; where there is no respect of person; where will is nothing and power is nothing and numbers are nothing, and all are equal and all secure before the law."

It is the court of last resort for the humblest citizen of the land, for, as stated by Edward J. Phelps, the foremost American lawyer of his time:

"If oppression and wrong should gain the ascendancy and injustice stalk abroad in the land, and all else fail him; nevertheless his humblest roof, and all the things that are sheltered beneath it, would find, somehow, some way, a final refuge and protection in the Supreme Court of the United States."

* * *

William Howard Taft is receiving personal congratulations on his appointment by President Harding and his confirmation by the Senate, to the office of Chief Justice. Such congratulations are proper, and in them The Tribune joins. But still more appropriate and

pertinent, we believe, are the heartfelt congratulations springing from every part of this great republic, to the whole country itself and to every citizen thereof, that the highest wisdom has in this instance guided the judgment of the appointing power.

It is a deserved promotion for Mr. Taft, after his service as President of the Nation, and one for which he has qualified by an exceptionally wide and varied experience in almost countless executive and judicial positions, both national and international. No American has ever been, so much as Mr. Taft, qualified by experience and by temperament for this high position. He has been a practicing lawyer, a law reporter, prosecuting attorney, judge of state courts, general solicitor of the United States, United States circuit judge, professor and dean of law schools, president of the United States Philippine commission, governor of the Philippine Islands, national delegate to Rome, Secretary of War, provisional governor of Cuba, official investigator of this country's foreign possessions and of conditions in foreign countries, and then President of the Nation.

Later as professor of law, member of the National War Labor Conference board, president of the American National Red Cross, president of the American Bar Association, and other notable organizations, he won for himself the position of America's most eminent citizen, devoting his energies and time to studying public questions and giving enlightenment thereon to his fellow citizens of the Nation.

* * *

He has acquired and demonstrated the possession of prodigious vision on all matters pertaining to government and brings to the highest judicial office in the Nation a breadth of view and an extent of practical experience which, together with his judicial knowledge and habit of thought, have thoroughly trained him for this high office.

He possesses in a marked degree those distinctive qualities necessary for this high judicial position. He is by nature kindly and human. Not only is his mind one which, by nature and by practice, approaches the consideration of facts and the conclusions therefrom in a judicial attitude, but he has an inherent and deeply developed judicial conscience.

He has conscientiousness, fairness and conservatism; and a habit of mind characterized by liberality, but at the same time safeguarded from radicalism. Lastly, he has a staunch fearlessness. He brings to the Supreme bench

those qualities which will strengthen it and tend to maintain for it that balance and equilibrium which belong to it by tradition.

* * *

As Chief Justice he will fulfill the admonition given by Moses to the Judges of the Israelites:

"Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; ye shall not be afraid of the face of man."

And in his judgments he will meet the ideal of the just judge, who, in the words of Horace—

"Firm in the consciousness of right, disdains, with equanimity, the frowns of a tyrant and the clamors of a mob."—ROME G. BROWN in *Minneapolis Tribune*.

REPORT OF THE MEETING OF THE IOWA BAR ASSOCIATION.

The twenty-seventh annual meeting of the Iowa State Bar Association was held at Waterloo, Iowa, on June 23 and 24, with 330 lawyers in attendance. 150 new members were added at this meeting, making the total membership of the Association over 1220. This represents perhaps a larger proportion of the total membership of the bar in active practice in the state than in any other similar state association. Of this number, only about 20 are behind in the payment of dues.

The two principal addresses of the meeting were given by Professor Edson R. Sunderland of Ann Arbor, Michigan, who spoke on "Preventive Justice Through Declaratory Relief," and the annual address on "Lawyers and Legislation," by Senator C. S. Thomas of Denver, Colorado. Judge E. G. Albert of Jefferson, Iowa, presented a paper on "The Right of a Public Utility to Suspend Service."

The Association refused to adopt a resolution asking for the enactment of a statute requiring all active practicing attorneys in the state to be members of the Bar Association. The Association went on record as recommending the following procedural changes:

1. That in all cases an equitable demurrer must be specific.
2. That appeals to the Supreme Court be required to be taken within three months from the date of judgment or decree.
3. That no appeals in civil actions could be taken to the Supreme Court where the amount involved is less than five hundred dollars without a certificate of the District Court.
4. That a final decree of distribution definitely establishing the rights of all parties shall be entered in all probate proceedings.

5. That on appeals to the Supreme Court no printed abstract shall be required, but that the appellant shall file with the clerk of the Supreme Court the transcript in the case and that each party shall state in the printed argument so much of the record only as is essential and necessary to present the questions raised on appeal.

6. That actions may be brought at any time upon proper notice, without reference to term time, and that issues may be made up in vacation.

The Association refused to recommend the following propositions which were submitted:

1. That trial courts be authorized by statute to permit a jury, after a cause has been submitted to it, to adjourn before reaching a verdict and separate, without being in charge of an officer, and reconvene for further deliberation.

2. That the state be permitted to secure a change of venue in the trial of criminal cases upon the same conditions that such change is allowed to a defendant.

3. That a probate court be created in each county with jurisdiction in all probate matters.

4. That the code be amended by striking therefrom the provision that the attorney or attorneys for the state shall not during the trial of a criminal case refer to the fact that the defendant did not testify in his own behalf.

The twenty-eighth annual meeting is to be held at Sioux City, Iowa, on June 22 and 23, 1922. The following officers were elected for the current year: President, Judge Jesse A. Miller, Des Moines; Vice-President, James A. Devitt, Oskaloosa; Secretary, H. C. Horack, Iowa City.

BOOK REVIEWS

SEARS' TRUST ESTATES—SECOND EDITION.

Necessity is the mother of invention. Just as the use was developed to defeat the statutes of Mortmain and the common law disabilities of married women, so the trust, the successor of the use, is being used to defeat the statutory restrictions and exactions upon corporations; and legal ingenuity has found a way to create a trust which will have most of the advantages of the corporate form and be free from all its great burdens. Mr. John H. Sears, formerly of St. Louis, now of New York

City, several years ago began a study of this device, first used in a large way in Massachusetts, and issued the first real text book on the question. This book had a wide sale and has been cited in nearly every discussion of the subject. The present volume is the second edition of this standard authority.

The interest aroused in this new equitable device, if such it may be called, and the extravagant claims made for it by superficial lawyers and business promoters demand a careful, scientific treatment of the subject by one who is in full sympathy with all that is good and valuable in the new device, but who understands its limitations and its dangers and is free to declare when it would be desirable and when unwise to make use of this device.

This revised edition is rewritten, enlarged and contains analyses of the many cases which have appeared since the first edition. An entire new chapter on the Police Power, and attempted application of corporation laws; many new sections regarding the management of trust estates; the proper drafting of declarations and agreements of trust; reprints of legislation, and additional exhibits of approved forms and precedents.

The work shows in what manner and how supported by legal authority a trust estate may have transferable shares, exemption of shareholders' liability, continued existence and safe management.

The standing of the trust estate with reference to taxation and the doing of business on a basis of common right, without hindrance from discriminating statutes, is carefully discussed.

Printed in one volume of 782 pages and bound in buckram.

HUGHES' PRIMER OF PRINCIPLES.

Mr. W. T. Hughes of Chicago, has issued a new volume in his series of books on the Latin Maxims, which he terms the "organic maxims of all systems of procedure." This new volume is called a Primer of Principles and contains much of the matter to be found in his work entitled, "The Law Re-stated," with the addition of many recent cases and a different arrangement.

Mr. Hughes has probably done more than any one else to bring to the attention of the profession the importance of the Latin Maxims as the quintessence of the legal learning of all the ages. He has used stirring invective and merciless satire to expose the shams of "case" lawyers and jurists and has urged the students of the law to ignore the time serving

schools of law and text books made with shears instead of with brains and seek the origins and beginnings of legal principles in the works of the Latin masters and the corpus juris, from which all that is worth while in the law of every jurisdiction has been derived. He leads the student past the latest decision of the common law, to judges like Mansfield; to text writers like Story, and to philosophers like Bacon.

Mellius est petere fontes quam sectari rivulos.

Contrary to the prevailing opinion that pleading and procedure is purely local and accidental, Mr. Hughes believes it to be fundamental. He believes that pleading and procedure come first and that substantial rights flow therefrom and are inseparably connected with the remedies given by the Court. He believes that in a Constitutional government, the Court is the fount of the law, and that the Court can act only in a coram judge proceeding. Hence the importance of such a maxim as *De non, apparentibus et no existentibus eadem est ratio*, which he freely translates as follows: "What is not judicially alleged cannot be judicially presented or considered."

Mr. Hughes is not, as might be supposed, a friend of mere technicalities. He looks to substance. He favors a liberal policy of amendment of pleadings, but rejects utterly the notion that any court has any jurisdiction to decide any case on the evidence adduced unless the pleadings conform thereto. He shows with consummate skill that unless this be true, the principles of *res adjudicata* and due process of law are undermined and destroyed.

It is said that Mr. Hughes exaggerates the importance of the maxim. This is possibly true in the sense that every propagandist emphasizes the truths upon which his particular message is based. But such emphasis is sometimes needed when these old truths are so utterly neglected, as they are today.

Printed in one volume of 538 pages and bound in law buckram.

HUMOR OF THE LAW.

The late Commodore E. C. Benedict, was a poor public speaker. To prove this fact he often used to tell at Indian Harbor a story which ran in this wise:

"Once when I was in Greenwich the farmers held a banquet at the hotel, and the toastmaster called on me to make a speech.

"Now, gentlemen," I said, as I got up, 'it isn't fair to ask me to speak to you, for it is notorious that I am the worst speaker in Connecticut. My reputation as a bad speaker is such that'—

"Here a fat farmer interrupted me. He had had a little too much red-eye and he rose and said solemnly:

"Gents, I take—hic—exception to what the Commodore remarks. I—hic—and not him, am the worst speaker in Connecticut."

"Then I interrupted the fat farmer in turn.

"Friend," I said, 'we'll leave it to our fellow-banqueters here assembled. You sit down while I say my piece, and I'll sit down while you say yours, and our companions will decide by vote which of us is Connecticut's worst speaker.'

"Right you are, Commodore," said the fat man solemnly, and he sat down.

"I plunged into my speech vigorously, but in a minute or so that tiresome fat fellow was on his feet again.

"It's all right—hic—Commodore," he said. 'You win. You needn't go no farther.'

—Los Angeles Times.

A little four-cylinder coupe drew up to the Fifth avenue curb, and it was evident to the policeman that the turbaned young woman at the wheel intended to stop within a few feet of a fire hydrant. Jumping on the running board, the policeman said:

"Hey! You can't stop here."

The young woman glanced at the cop triumphantly.

"Oh, can't I, though? You don't know this car!"—Globe-Democrat.

"I see a visitor in New York was arrested the other day because he had \$350 in his pocket," said Church.

"And it wasn't his own money?" asked Gotham.

"Oh, yes; it was proved in court that it was his own money," replied Church.

"Why on earth did they arrest him, then?"

"He was trying to get out of town with it."—Pittsburg Chronicle-Telegraph.

When Cyril James entered the army he was put on guard duty while green at the game.

"Who goes there?" he challenged.

"Friend."

"Advance, friend, and give the countersign."

"Tloga."

"Thanks, old man," replied Cyril blandly, "I'd forgotten it myself."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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Pennsylvania	23, 33, 41, 48, 58
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United States C. C. A.	3, 10, 12, 52
United States D. C.	2, 17, 18, 51
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1. **Attorney and Client—Disbarment.**—An attorney who bought a house, but not the lot on which it was situated, and who did not assume to pay a note given for the lot, is not guilty of unprofessional conduct in buying the claim on the note for the purchase of the lot against the estate of the maker, which claim had been filed by the attorney, and in setting off that claim against the note given by the attorney in payment for the house.—*In re Case*, S. D., 182 N. W. 638.

2. **Bankruptcy—Attorney's Fee.**—Where persons filing voluntary petitions in bankruptcy were able to pay their attorney, and were earning money, and by proper saving and conduct could accumulate and procure the money with which to pay the filing fee and referee's fee, they will not be permitted to maintain the proceedings without such payment.—*In re Latham*, U. S. D. C., 271 Fed. 538.

3. **Chattel Mortgage.**—Under the law of Florida that a chattel mortgage on merchandise, though recorded, is void as against creditors of the mortgagor, if he is authorized by agreement or understanding with the mortgagee to retain possession of and sell the mortgaged property, a mortgage on an automobile, given by a dealer, who by permission of the mortgagee kept it in his salesroom for sale until his bankruptcy, held void as against his trustee, under Bankruptcy Act, § 47a.—*General Securities Co. v. Driscoll*, U. S. C. C. A., 271 Fed. 295.

4. **Banks and Banking—Bank as Agent.**—Where one who is bound to pay money to another, instead of paying said money direct, or in accordance with the contract of the parties,

pays the money to a bank for the other, he thereby makes the bank his own agent and makes such payment at his own risk, and in order to avoid liability it is necessary for him to show that the other received the money from the bank.—*Lee v. Little*, Okla., 197 Pac. 449.

5. **Deposit Slip.**—A deposit slip issued by a bank is but prima facie evidence that the bank received the amount of the deposit on the date shown by the slip. It has no more force and effect than any other form of receipt, and is open to explanation as to the conditions surrounding the deposit and the circumstances under which it was given may be inquired into.—*Hastings v. Hugo Nat. Bank*, Okla., 197 Pac. 457.

6. **Failure to Pay Assessment.**—Under Burns' Ann. St. 1914, § 3341, providing that whenever the auditor of state shall have reason to believe that capital stock of a bank is reduced by impairment, stock must be assessed, and, if any stockholder fails to pay the assessment, his stock shall be sold, held, that proceeds of such a sale after payment of costs of the proceeding went to the stockholder and not to creditors.—*Citizens' State Bank v. Perisho*, Ind., 130 N. E. 857.

7. **Forgery.**—Where the bank presenting a forged check had an account of the apparent drawer of the check, so that it had among its files the genuine signature of the drawer, it was not, because of such fact, as a matter of law, negligent in failing to detect the forgery of the drawer's signature.—*First Nat. Bank v. United States Nat. Bank*, Ore., 197 Pac. 547.

8. **Telegram as Check.**—A depositor's telegram directing a bank to pay a stated amount of money to a named person to whom the depositor was indebted, is equivalent to a written check for the payment of the money, and there is no privity between the person named as payee and the bank so as to give him a right of action against the bank for payment of the money.—*Southern Trust Co. v. American Bank of Commerce & Trust Co.*, Ark., 229 S. W. 1026.

9. **Bills and Notes—Conditional Promise.**—In an action on a note by an innocent holder for value, the maker cannot testify to a state of facts rendering the note a conditional promise, to pay.—*Parks v. Stevens*, Ga., 106 S. E. 925.

10. **Liability of Indorser.**—In an action on a note given to the holder of four other notes, an affidavit of defense which stated that the defendants had signed the other notes as indorser does not show even prima facie that plaintiff was a technical indorser, since, if he signed the notes on the back before they were delivered, or after they were delivered while they were in the hands of the payee, for the purpose of enhancing the credit of the notes, he is not entitled to the privileges of an indorser, but is liable as a joint maker, and is not released by the extension of the notes without his consent.—*Ryan v. Security Savings & Commercial Bank*, U. S. C. C. A., 271 Fed. 366.

11. **Transfer.**—Where defendant gave his notes in connection with a sales-stimulating contest organized by the payee company, though all the notes were payable before expiration of time for completion of the payee company's contract, both on the doctrine of estoppel and on the principle that a failure of consideration in whole or in part after a bona fide assignment

of a promissory note is no defense to a suit by the assignee against the maker, notwithstanding the assignee's full knowledge of the original consideration for which the note was given, defendant maker was liable to a transferee of the notes.—*Pratt v. Dittmer*, Cal., 197 Pac. 365.

12. **Brokers** — Right to Commission. — A broker held not deprived of the right to his agreed commission for the sale of a ship, where he procured a purchaser who was accepted by his principal, because such purchaser was a member of a firm with which he had agreed to divide the commission, where the transaction was in good faith and the facts were known to the principal.—*Charles R. McCormack & Co. v. Keeveny*, U. S. C. C. A., 271 Fed. 299.

13. **Carriers of Live Stock**—Delay.—Rev. St. 1919, § 10449, which changes the established rule by providing that, on proof by plaintiff shipper of delay and damages caused thereby, the burden of proof shifts to the defendant carrier to show that the delay was not due to its negligence, includes express companies.—*Arky v. Wells Fargo & Co. Express, Mo.*, 229 S. W. 821.

14. **Commerce**—Interstate. — Furnishing of car is part of interstate "transportation;" "common carrier."—*Cecil v. Southern Express Co.*, Ky., 229 S. W. 1041.

15.—"Property Taxes."—The taxes upon the property of a palace car company at the rate of 3 and 4 per cent of the gross receipts from business transacted in the state of California, levied under Const. art. 13, § 14, as amended in 1910, and statutes passed pursuant thereto, are "property taxes," and not taxes on gross receipts derived from interstate taxes.—*Pullman Co. v. Richardson*, Cal., 197 Pac. 346.

16. **Constitutional Law** — Anarchistic Doctrines.—The power of the legislature, as by Penal Law, §§ 160-166, defining and denouncing criminal anarchy, to forbid the advocacy of doctrines looking toward the overthrow of existing government by direct proletarian mass action, is not limited by any necessity to show that there is a present or immediate danger that the advocacy will be successful. The initial and every other act knowingly committed for the accomplishment of anarchistic purposes may be forbidden and declared to be a crime.—*People v. Gitlow*, N. Y., 187 N. Y. S. 783.

17.—Denial of Admission to Bar.—While the right of an attorney to practice law is a property right of which he cannot be deprived without due process of law, refusal to grant him a license to practice in the courts of a state is not an abridgement of any privilege or immunity, in which he is protected by the Fourteenth Amendment or art. 4, § 2, of the Constitution.—*Keeley v. Evans*, U. S. D. C., 271 Fed. 520.

18.—Freedom of the Press.—The action of the city officials in prohibiting the sale on city streets of newspapers containing articles attacking the Jewish race, because of disapproval of those articles, is a violation of the right of the freedom of the press.—*Dearborn Pub. Co. v. Fitzgerald*, U. S. D. C., 271 Fed. 479.

19. **Contracts**—"Cost of Completion" Defined.—The expression "cost of completion," in building contracts authorizing the owner to complete the work on the contractor's default, means the actual amount necessarily expended in completing the work, provided that the same is fair

and reasonable.—*Clark v. Fleischmann Vehicle Co.*, N. Y., 187 N. Y. S. 807.

20.—Mutuality.—Although a contract for the purchase and sale of beer was until execution unenforceable on account of want of mutuality, yet after execution and delivery action for the purchase price cannot be defeated on the ground of lack of mutuality in the contract.—*Joseph Schlitz Brewing Co. v. Missouri Poultry & Game Co.*, Mo., 229 S. W. 813.

21. **Corporations** — Compensation for Serving Public.—Where a public utility corporation is engaged in furnishing to the public through various departments of its business different kinds of service, it cannot be compelled to carry on a branch of its business which furnishes one kind of such service at a loss, though its whole business may be conducted at a profit.—*Mt. Carmel Public Utility & Service Co. v. Public Utilities Commission*, Ill., 130 N. E. 693.

22.—Consideration for Stock.—The fact that a corporation whose stock was subscribed to on deferred payments, a note being given for the balance, had not actually written out the stock certificate in advance of the payments which were required to be made, is immaterial on the issue of failure of consideration for the note, and did not operate to deprive the company of its right to compel payment.—*Beneficial Loan Ass'n v. Hillery*, N. J., 113 Atl. 324.

23.—Laches of Stockholders.—Where plaintiff stockholders had full knowledge of the receivership proceedings and of the sale of the company's assets under a bondholder's agreement, and one of the plaintiffs participated in such agreement and received stock in a reorganized company for his bonds, but none of them took action in the matter until four months after the receiver had been discharged on payment of all the creditors of the company and after war contracts secured by the company had proved profitable, plaintiffs were guilty of laches which bars their right to attack the receiver's sale.—*Yorks v. Altmiller*, Pa., 113 Atl. 415.

24. **Deeds**—Blanket Description.—Blanket description employed in ancient deed offered in evidence by plaintiff in an action of trespass, for the conversion of lumber, and for trover, when its latent ambiguities were explained by the evidence as to the land owned by the grantors' ancestor, held sufficient to convey title to the grantees.—*McMillan v. Aiken*, Ala., 88 So. 135.

25. **Divorce**—Nonpayment of Alimony.—The judgment requiring the payment of alimony within the time specified, and in default of such payment that the defendant be incarcerated, was authorized under the pleadings and the evidence.—*Roe v. Watson*, Ga., 106 S. E. 907.

26. **Easements**—Rights Thereunder. — Whatever rights of passage one has over a way, she has no right to build a concrete walk or otherwise disturb the soil.—*Littlefield v. Hubbard*, Me., 113 Atl. 304.

27. **Electricity** — Extension of Service. — Under Public Service Commission Law, authorizing the commission to order reasonable improvements and extensions, an electric power company could not be required to furnish electricity to a part of a territory which it has not undertaken to serve, since to require the company to serve such a community would constitute the taking of private property for public use without just compensation.—*State v. Public Service Commission*, Mo., 229 S. W. 782.

28. **Frauds, Statute of**—Parol Agreement.—A parol agreement, whereby, in consideration of the father's surrender of the custody of plaintiff and the latter's living with defendant's intestate as a son, intestate agreed that his lands owned at his death should become plaintiff's property, is, in effect, a parol sale of the lands to be performed in the future, and is within the statutes unless taken therefrom by part performance.—*Hooks v. Bridgewater*, Tex., 229 S. W. 1114.

29.—Sale of Land.—Under our statute of frauds, the agreement for the sale of lands may

consist of separate instruments, but the statute requires, not only that the contract or some note or memorandum thereof be signed by the vendor, but in the instruments, or some paper to which they refer, the name or some description of the vendee must also appear, so that he can be identified without parol proof.—*Barkhurst v. Nevins*, Neb., 182 N. W. 563.

30. **Highways—Labor Not Taxation.**—To require the inhabitants of a district to perform labor upon the public roads is not "taxation," and the collection of the amount required by law to be paid by any such inhabitant who fails to perform the labor required of him is not in violation of any of the provisions of the Constitution of this state.—*Propst v. Calhoun County Court*, W. Va., 106 S. E. 878.

31. **Insurance—Construction of Contract.**—The contract contained in application for insurance, being unilateral in character, will be strictly construed to prevent a forfeiture.—*Modern Woollen of America v. Han, Ind.*, 130 N. E. 849.

32.—**Fraud.**—In an action on a life policy, where plaintiff claimed that lapsing of policy sued on was procured by fraud and misrepresentation of agent, court properly instructed: "If the jury find by the preponderance of the evidence that W, as agent of the defendant, procured the lapsing of the policy by fraud and false representations, then the defendant company cannot retain the benefit of such conduct of W and be relieved from the consequences of such fraudulent means by which such lapsing was obtained."—*Combs v. Jefferson Standard Life Ins. Co.*, N. C., 106 S. E. 826.

33.—**Insurable Interest.**—An endowment policy, where the amount of insurance was paid in full at the time of its execution, and to secure the company in the collection of premiums a mortgage was taken which covered the cost of the insurance plus the interest on the sum advanced and other charges to be satisfied at the end of the endowment period, provided there was no default in the payments fixed or sooner if insured should die, is of a character not objectionable when insurable interest appears.—*United Security Life Ins. & Trust Co. v. Brown*, Pa., 113 Atl. 443, 446, 447.

34. **Intoxicating Liquors—"Concurrent Power."**—The power of congress and the several states to enforce Const. U. S. Amend. 18, under § 2, providing that the congress and the several states shall have "concurrent power" to so do, is not joint, but is a separate and independent power, each having the right to act separately and independently, in aid of such amendment, but where the state and the federal statutes conflict, the federal act shall prevail, in view of art. 6, making the United States constitution and the laws made pursuant thereto the supreme law of the land.—*State v. Ceriani*, Conn., 113 Atl. 316.

35.—**Unlawful Intent.**—In this state, where a person has concealed and has in his possession an excessive quantity of intoxicating liquor, a presumption arises that it is kept for an illegal purpose.—*Rogers v. State*, Okla., 197 Pac. 525.

36. **Landlord and Tenant—Option to Purchase.**—Where a written contract of rent contained a promise by the obligor to sell the land rented to the obligee, at his election, during the year of the rental, at a stipulated price, and before the expiration of the year the tenant exercised his option and the vendor received the full amount of the purchase money, with interest from the date of the sale, he was not also entitled to receive rent.—*Bentley v. Barrett*, Ga., 106 S. E. 815.

37.—**Safety of Premises—Breach by landlord of agreement to keep stairway in safe repair would not afford a basis for an action for damages for personal injuries.**—*Turner v. Ragan*, Mo., 229 S. W. 809.

38. **Master and Servant—Assumption of Risk.**—Where an experienced machinist worked for three or four months before his eye was injured while chipping castings with a chisel and hammer, both in good condition, and he was familiar with chipping and had been hit before, knew that was a part of his work, and saw others wearing goggles, and asked for his tools, but did not ask for or use goggles, held that he as-

sumed the risk of such injury.—*Harbacek v. Fulton Iron Works Co.*, Mo., 229 S. W. 803.

39.—**Basis of Compensation.**—Where coal miner, paid per ton for digging and loading coal, was prevented from earning the average amount earned by miners doing similar work because assigned to work in a room where the coal lay beneath a roof of slate three feet in thickness, requiring him to spend much of his time picking up slate, and not because of any lack of industry or inability on his own part, the compensation to which he was entitled under Workmen's Compensation Act, § 7, par (a), § 8, par. (f), § 10, pars. (a), (b), (d)-(f), will be based on the average amount earned by miners in similar work, and not on the actual amount earned by the injured miner.—*Centralia Coal Co. v. Industrial Commission*, Ill., 130 N. E. 725.

40.—**Course of Employment.**—An employee merely going to or from the place of his work is not engaged in performing any service growing out of and incidental to his employment, relative to right to award for his injury at such time.—*Clapp's Parking Station v. Industrial Accident Commission*, Cal., 197 Pac. 369.

41.—**"Employee" and "Independent Contractor" Distinguished.**—Where a contract for the removal of rock in a mine required the contractor to furnish labor and materials and provided payment at certain prices per yard of excavation, but required the work to be carried on to the satisfaction of the manager and in the manner he directed, authorized the operator to require the contractor to discharge any workman it deemed incompetent or unsatisfactory, and made the contractor and all his employees subject to the direction of the mine foreman, who, under Act June 2, 1891, has the supervision of the mine and is the agent of the operator, it reserves to the mine owner and his agent control of the manner of doing the work as well as the result to be attained, so that the contractor was an "employee" within the Workmen's Compensation Law, and not an "independent contractor."—*Kelley v. Delaware, L. & Western R. Co.*, Pa., 113 Atl. 419.

42.—**Liability for Medical Treatment.**—The Workmen's Compensation Act, in force in 1917, did not give to a physician or surgeon who furnished medical treatment to an injured employee a right of action for the value thereof against an employer who had not requested or consented to the furnishing of the treatment by such physician or surgeon.—*Beach v. Gendler*, Minn., 182 N. W. 607.

43.—**Proximate Cause of Injury.**—In a section hand's action for personal injuries, sustained when a handcar loaded with tools was pushed against him by the stumbling of another employee, the mere fact that such other employee stumbled held not to raise any presumption of negligence as the cause of injury.—*Stones v. Chicago, M. & St. P. Ry. Co.*, Mont., 197 Pac. 252.

44.—**Right to Commission.**—Where an agent procures orders for his principal upon the principal's agreement to pay a commission therefor, the agent is entitled to his commission, even though the principal does not ship the orders, since, unless it is otherwise stipulated, the agent does not assume the risk of performance.—*Booth v. New Process Cork Co.*, N. Y., 187 N. Y. S. 725.

45.—**Trade Information.**—If a corporation's general manager had information relative to trade conditions which would have benefited the company, it was his duty to give it the benefit of such information, and refusal constituted ground of complaint against him.—*Reilly v. Henri Gutmann Silks Corporation*, N. Y., 187 N. Y. S. 717.

46. **Mechanics' Liens—Description.**—In the instant case the description and recitals in the lien statement filed in every particular identified the premises adjoining those intended to be charged with the lien, and nothing in such statement could be construed as describing or identifying the premises for which the material was furnished.—*H. S. Johnson Co. v. Ludwigson*, Minn., 182 N. W. 619.

47.—**Responsibility for Improvements.**—The legislature may provide that an owner who fails to disclaim responsibility for improvements made with his knowledge shall be deemed to

have authorized them.—*Berglund & Peterson v. Wright, Minn.*, 182 N. W. 624.

48. **Mines and Minerals**—Royalty on Coal.—Royalty, paid on coal not mined, based on price at time of payment.—*Shoemaker v. Mt. Lookout Coal Co., Pa.*, 113 Atl. 410.

49. **Mortgages**—Fraud.—Where plaintiff had not rescinded, and did not seek to rescind, the mortgage he claimed was procured by fraud, and did not restore, nor offer to restore, the property obtained by him, and his action was clearly an action for damages only, an injunction, under Code Civ. Proc., § 603, was not authorized; and where the only thing defendants were threatening to do, tending to make judgment ineffectual, was to foreclose the mortgage, plaintiff was not entitled to an injunction, under § 604, subd. 2, as under such section he should show a threat to remove or dispose of property.—*Sherwood v. Fred O. H. Fincke Co., N. Y.*, 187 N. Y. S. 755.

50. **Municipal Corporations**—Bond Issue.—The issuance of bonds by a city under Rev. Code 1919, § 6409, only for the purpose of funding special assessments, does not constitute a debt within the meaning of Const. art. 13, § 4, as to vote of electors, nor would an election be necessary to authorize the issuance thereof, the bonds to be paid by the funds to be collected by special assessments and not by any general taxes that might be assessed against property outside of the assessment district.—*Gross v. City of Bowdle, S. D.*, 182 N. W. 629.

51.—**Prohibiting Sale of Publication**.—The limit of a city's power to enforce an ordinance prohibiting the sale of obscene or scandalous publication is to conduct a prosecution for the specific offense thus committed. It cannot, by establishment of a censorship in advance of future publications, prohibit generally the sale thereof, upon the streets.—*Dearborn Pub. Co. v. Fitzgerald, U. S. D. C.*, 271 Fed. 479.

52. **Negligence**—Wheel Held Dangerous Attraction to Children.—The jury could find it was negligent for an express company to leave on its platform outside its warehouse a heavy wheel tilted against the wall in such a way that children could set it on edge and play therewith, so that the express company could be held liable for the death of a child occasioned by such play, though it would not be if the wheel had been tilted so far that it could have been straightened up only by an adult.—*American Ry. Express Co. v. Crabtree, U. S. C. C. A.*, 271 Fed. 287.

53. **Newspapers**—"Daily Newspaper".—Where municipality was required to designate, for purposes of publication of notices, a daily newspaper, a paper printed daily, relating principally to legal matters, which gave calendar of the courts, etc., and carried only plate matter to fill space, held not a "daily newspaper;" the public generally not subscribing.—*Finnegan v. Buck, N. Y.*, 187 N. Y. S. 705.

54. **Railroads**—Punitive Damages.—A judgment against a railway company for death of a passenger occasioned by the negligence of the servants of the Director General of Railroads is in effect against the government, and punitive damages cannot be recovered against the government.—*Calhoun v. Southern Ry. Co., S. C.*, 106 S. E. 780.

55. **Sales**—Admissibility of Evidence.—When a buyer of fertilizer could not procure other fertilizer on the seller's failure to deliver, evidence as to the difference between the crop on which the fertilizer was to be used and fertilized crops on adjoining land of similar quality worked in the same way was admissible.—*McCown-Clarke Co. v. Muldrow, S. C.*, 106 S. E. 771.

56.—**Breach of Contract**.—Where the buyer refused to take and pay for goods, the seller cannot recover the entire purchase price in an action on the contract, and not for its breach, without alleging that he stored or retained them for the buyer pursuant to Civ. Code 1910, § 4131.—*J. E. Dunson & Bros. Co. v. J. C. Smith Seed Co., Ga.*, 106 S. E. 914.

57. **Specific Performance**—Election of Remedy.—Where defendant asserted in his answer and at trial his wife's refusal to join in the conveyance he had agreed to make, the wife having been examined as a witness, plaintiff

should then have elected to sue for damages, or to take the conveyance subject to the wife's dower, with abatement of price therefor, and evidence of the ages of the defendants should be submitted to determine value of dower, of evidence admitted to show damages, so that definite judgment might be entered, and it was not a case for alternative judgment.—*Weintraub v. Kruse, N. Y.*, 187 N. Y. S. 713.

58. **Street Railroads**—Failure to Improve Street.—A street railroad company is not excused from performing its contract to reduce its tracks to the new grade and pave the tracks by its financial embarrassment and difficulty in procuring material and labor, where the municipality offered to permit the company to use the existing material, and the improvement was undertaken before our entrance into the world war.—*Borough of Sayre v. Waverly, Sayre & Athens Traction Co., Pa.*, 113 Atl. 424.

59. **Sunday**—Sales.—Sales of ice cream or cigars are neither a work of necessity nor charity, with Cr. Code 1912, § 698, nor are they excused where the money received therefrom is devoted to Red Cross or other charitable work.—*Oliveros v. Henderson, S. C.*, 106 S. E. 855.

60. **Taxation**—Charitable Purposes.—To be exempt from taxation as property used for charitable purposes, under § 6301, Rev. St. 1913, a building must provide necessary quarters and facilities for an organization devoted, as its dominant purpose, to the dispensation of actual relief to the unfortunate or suffering or to some work of practical philanthropy. The mere fact that the building is used as headquarters by a secret fraternal society which teaches charitable principles and encourages charitable sentiments among its members is not sufficient to constitute a use of the building for charitable purposes within the meaning of the statute.—*Appeal of Scottish Rite Bldg. Co., Neb.*, 182 N. W. 574.

61.—**Gross Production Tax**.—The "gross production tax" levied under Chap. 39, Sess. Laws Ex. Sess. 1916, is a "property tax" purely, and is levied in full and in lieu of all other taxes, state, county, township, district and municipal.—*In re Skelton Lead & Zinc Co.'s Gross Production Tax for 1919, Okla.*, 197 Pac. 495.

62. **Telegraphs and Telephones**—Liability for Interstate Message.—Whether a stipulation restricting the liability of telegraph company for transmission of an interstate message is valid depends on federal law.—*Parks v. Western Union Telegraph Co., Nev.*, 197 Pac. 580.

63. **Waters and Water Courses**—Boundaries of Irrigation District.—The requirement of the constitution as to due process of law does not give a property owner an absolute right to notice and hearing before his property may be included within the limits of an irrigation district on petition for change of boundaries under Irrigation District Act, §§ 85-97.—*People v. Cardiff Irr. Dist., Cal.*, 197 Pac. 384.

64. **Wills**—Revocation.—There is no fixed rule by which the revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator. Each case must be governed by its own peculiar facts.—*Hill v. Hill, Neb.*, 182 N. W. 578.

65.—**Testamentary Capacity**.—The real test of capacity of a testator is that he must have strength and clearness of mind and memory sufficient to know in general, without promissory, the nature and extent of the property of which he is about to dispose, the nature of the act which he is about to perform, and the names and identity of the persons who are the proper subjects of his bounty, and his relation towards them; but he need not have a "capacity to comprehend perfectly," so as to remember with absolute accuracy each item and detail of his holdings.—*In re Eno's Will, N. Y.*, 187 N. Y. S. 757.

66.—**Vested Remainder**.—The words in a will "after the death of A" and similar expressions are to be construed as meaning at the termination, whenever and in whatever manner occurring, of the particular estate of freehold, and as referring to the time when the estate will vest in possession only, a remainder thus created "after the death of A" being a vested remainder unless there is that in the context clearly taking it out of the rule.—*Dustin v. Brown, Ill.*, 130 N. E. 859.

Central Law Journal.

St. Louis, Mo., August 12, 1921.

CHIEF JUSTICE TAFT.*

The high office of Chief Justice of the United States is one that brings honor to any person, however exalted his position amongst his fellows. William Howard Taft as man, citizen, statesman and jurist more nearly approximates the status of honoring that great office than any man, living or dead.

He had held the highest civil office at the gift of his people and might have retired on that recognition with his name at the top of the scroll of fame, for the elective office of President of the United States has no superior. He had held next to the highest judicial office, for the Federal Circuit Court of Appeals ranks next to the Supreme Court. He had performed with energy, discretion and good judgment the duties incumbent upon the counsel and advocate who appears for the great Republic in the Supreme Court, for it is the Solicitor General who performs these duties. He had presided as a kindly but wise and firm executive over an alien people, taken from bondage but yet under subjection, because of the unpreparedness of the Philippines for self government. He had done much more and done it well, including the sacred and trying duty of arbiter between capital and labor.

He has the respect, veneration and militant love of his own people, understandingly, unstintingly and enthusiastically expressed. There were no politics in his nomination, no sectionalism in his selection and no partisanship in his confirmation. There was no competition pending executive consideration and there are no embittered rivals. There was just one Chief Justiceship and just one Taft. A great people knew

their man and their minds and the appointing power was conscious of the fact.

In rank he is comparable with Washington in that he is first as a man, first as a statesman and first in the Judicial establishment. He is like him in that he was ever in "the fierce light that beats around a throne." He is unlike Washington in that he has escaped the calumny that dogged the footsteps of the Father of his Country. In freedom from slander, Taft is *sui generis*. From Washington to Wilson the Chief Executive has been a target for the vilest vituperations conceived in the wickedest personal envy and bitterest political strife. The combative Roosevelt stabbed his traducers into silence and confession with the light of a judicial trial, but the dignified Washington, the long-suffering Adams and the martyred Lincoln (and one may speak of the dead) trusted their reputations to posterity. And posterity is still defending them.

That Taft has escaped this unreasoning fury, so graphically depicted by Carlisle, is one of the qualifications for the sacred post of Chief Justice of the United States. The fact evidences a fearlessness and a purity and firmness of character that, standing out like a Gibraltar, discouraged that fiendish method of political assault whilst it stimulated a love and admiration that lies in the hearts of the people for men who are willing to sacrifice for principle. That public affection became appealingly personal as he traveled about the country.

It is all the more remarkable in that Taft supplied provocation in abundance to the politicians. Historians will concede that it cost him a second term in the presidency. His celebrated Greensboro (N. C.) address sounded the death knell of political judicial appointments and the wicked "judicial families" that he condemned. "The party leaders," said he, "may name the political office-holders, but so long as I am President, no man shall ascend the Federal Bench except for reasons of qualification for that high and sacred office, regardless of politics." From Mason and Dixon's Line to the Gulf

*(The absence of our Associate Editor, Mr. Shelton, in London, has prevented an earlier appearance of an appreciation of Chief Justice Taft, which it was desired should be prepared by him.)

there went forth a wail of protest that the Republican party organization in the South had been stricken unto death, for its leaders lived largely upon its patronage. But a grateful South gave him twenty fold of its great heart for every political enemy he made and, moreover, it stood with its life and its sacred honor to defend his motives, although, for reasons that need no comment, the South was helpless to prevent his political assassination. And thereby the great Judge Maker has become the great law giver.

For these reasons the student of the history of the life of Chief Justice Taft is constrained to believe in destiny, for he has appeared in places of power at the most opportune moment, an instance of which was the assumption of his last duty.

It is the believer in the "elasticity" of the Constitution who wishes to preserve its fabric and structure. For that reason Americans must herd closer together in governmental policies, that the Great Covenant may cover them all without too much strain. Here is where Mr. Taft's greatest constructive usefulness will appear. The people need a Constitutional leader—a Moses to guide them out of the wilderness of doubt from which they are incapable of fleeing. The student will accept him as a mentor, the Bench and Bar will bend to his decrees and business will cut its policies to his measure. An era of contentment, resting upon a foundation of confidence, lies just ahead.

John Marshall's fame lay in recognizing things that belonged within the shelter of the Constitution, as much as in discovering the counterfeit and the expedient pretender, who sought its protection. Taft's fame will lie more largely within the latter, for the Great Instrument now covers a wide field of theories and fancies. Owing to the pomp and tinsel and humane pretensions of modern proponents, Taft's work will prove more difficult, but it none the less thoroughly will be done. Like a Saint Peter, he will stand at the gate and call for the credentials of applicants for constitutional protection and

it must be a certificate that John Marshall would have approved. So long as the spirit of the Great Marshall lives in the heart of the Chief Justice, just so long will America be the land of equal opportunity, the real essence of democracy.

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS

WHAT IS DUE PROCESS OF LAW IN PROCEDURE?—The Supreme Court, in the recent case of *Ownbey v. Morgan*, 4. Sup. Ct. 433, declares that the 14th amendment to the Constitution, does not prohibit methods of procedure that have long since been discarded by modern society even though never changed or have been perpetuated in obsolete statutes.

Delaware is, in some respects, the most conservative state in the Union. It regards with great respect the ancient landmarks and the old traditions. For instance, it has petrified into the form of statute, an archaic rule of procedure based on an old custom of the City of London requiring a non-resident defendant sued by foreign attachment to give security to the value of the property attached, as a condition of the right to appear and defend. In the principal case, defendant was sued, and being unable to give special bail was not allowed to appear and defend the action. The theory of this law, following the Custom of London, is that a non-resident brought in by attachment should, before having the privilege of personally appearing to the attachment, put up bail equal in amount to the plaintiff's claim. Otherwise he might appear and defend and, if he lost, suffer only the property attached to be applied to the judgment. It was the theory of this Custom of London, that before a defendant should have the privilege of defending in case of foreign attachment, he should make it possible for the plaintiff to secure immediate satisfaction of his claim if he succeeded.

The early colonies, in adopting the remedy of foreign attachment, incorporated the custom of London with respect to special bail to be required of all defendants personally appearing to the action. But all states except Delaware, we believe, have abolished this harsh and barbarous practice.

The question before the Supreme Court was whether an old form of action or remedy may be so out of harmony with modern ideas of

justice as to amount to a violation of what is now considered due process of law. There can hardly be any doubt that if a new law should take away a defendant's day in court, it would be held void, but it seems, that an old rule of procedure once accepted as due process of law, which effects the same result, will be valid. This, at any rate, is the decision of the Supreme Court in the *Owney* case. The court said:

"The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. But a property owner who absents himself from the territorial jurisdiction of a state leaving his property within it, must be deemed ex necessitate to consent that the state may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who, after seizure of his property, comes within the jurisdiction and seeks to interpose a defense. The condition imposed has a reasonable relation to the conversion of a proceeding quasi in rem into an action in personam; ordinarily it is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition; and it cannot be deemed so arbitrary as to render the procedure inconsistent with due process of law when applied to a defendant who, through exceptional misfortune, is unable to furnish the necessary security."

We cannot see why the ancient origin of a rule of procedure has anything to do with the question of whether it amounts to due process of law. It is our conceptions of justice, not those of our aboriginal fathers, that should determine such an issue. If the rule announced by the Supreme Court is true then the law of any state could require a defendant to hold in his hand a red-hot poker to determine the truth of his denial of plaintiff's claim. This was once a legal method of procedure. We are disappointed in the Supreme Court's decision, not so much as to the actual results, as in its reasons, especially that reason which attaches importance to the age of a rule of procedure as giving it any greater consider-

ation under the due process of law clause than if it had been born today.

CARRIER'S LIABILITY FOR GOODS UNDER FORTY-EIGHT HOUR CLAUSE OF BILL OF LADING ACT WHERE CAR IS ENTERED BY CONSIGNEE.—A case involving \$23.50 for 126 baskets of grapes stolen from a freight car is the occasion for an important decision of the Supreme Court of the United States in the recent case of *Michigan Central R. R. Co. v. Owen*, 41 Sup. Ct. 554.

In this case, Owen received a carload of grapes. Within 48 hours after arrival, he accepted the car, broke the seals and began to unload. During this process 126 baskets of grapes were stolen and suit is brought against the carrier for the loss. With only one dissenting voice (*McReynolds*), the Court held the carrier liable, holding that under the provision of the uniform bill of lading that property not removed within 48 hours after notice of its arrival may be kept in car, depot, or place of delivery, subject to the carrier's responsibility as warehouseman, etc., the carrier's liability as carrier continues during the 48 hours, unless the property is removed within that time, though the car is accepted by the consignee, the seals broken, and unloading commenced.

The controversy here centers around the construction of section 5 of the Uniform Bill of Lading Act, which provides that "property not removed by the party entitled to receive it, within 48 hours, exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in car, depot, or place of delivery of the carrier subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at owner's risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

The defendant contended that when consignee accepted the car and broke the seals, it was released from further liability as carrier on the ground that the goods had been delivered to the consignee, and that its liability was that of warehouseman only. To this argument the Court replied:

"The answer puts too much emphasis upon the distinction between property removed and property delivered. The property here was not delivered; access was only given to it that it might be removed, and 48 hours were given for

the purpose. Pending that time it was within the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation. The bill of lading is definite, as we have pointed out, in its provisions and of the time at which responsibility of the company shall be that of warehouseman, and by necessary implication, therefore, until that responsibility attaches, that of carrier exists."

LOCATING A MINING CLAIM ACROSS STRIKE DOES NOT DEFEAT EXTRA-LATERAL RIGHTS.—When a prospector discovers a vein of ore on public lands, he is entitled to lay out a claim on the surface running parallel with the vein 150 feet long and 600 feet wide. If the apex of the vein is on the claim, the claimant may follow the dip of the discovery vein beyond the end lines, but is not entitled to ore beyond the side lines. But suppose the prospector makes a mistake as to the direction of the vein and lays out his claim at right angles to the strike, is he entitled to regard his side lines as end lines in order to follow the dip of the vein? The Supreme Court of the United States has settled this troublesome question in the recent case of *Silver King Coalition Mines Co. v. Conkling Mining Co.*, 41 Sup. Ct. 426, holding that where a claim is located so that the vein crosses the claim, instead of running lengthwise, as in the typical case, the locator does not thereby lose his extralateral rights on the dip of the vein beyond his end lines, under Rev. St. § 2322, but what he intended for his side lines are treated as his end lines, and he is entitled to the dip between vertical planes through those lines.

The defendant contended, however, that plaintiff had not established the fact that the vein crossing his location was his discovery vein. In this case there was some evidence that there was a vein running the length of plaintiff's claim and defendant contended that, at any rate, there was a presumption that this vein was the discovery vein. The Court of Appeals favored defendant's contention, but the Supreme Court held that there was no such presumption and that the evidence was not convincing that there was, in fact, any other vein.

Another contention of the defendant was that the plaintiff's shaft was 400 feet from the apex of the vein alleged to be discovered by plaintiff; that if the end lines were to be regarded as the side lines, then this shaft was not on the claim, since the claim could not be wider than 300 feet on either side of the vein. In this argument the Court replied:

"It is urged that if the end lines be taken as the side lines, then the discovery shafts be-

ing four hundred feet distant from the apex of the Crescent Fissure left either the vein or the discovery outside the location with the side lines limited as they should be. But at that time there was no requirement making a discovery shaft essential to a valid location. And in any event our conclusion being that the petitioner must be presumed to have discovered the Crescent Fissure, however it may have been done, the distance of the shafts does not affect the case."

NEED OF A SPECIAL PATENT COURT — THE ENGINEERS' POINT OF VIEW.*

Why a special patent court? asks T. W. Shelton, in your issue of May 13th. My answer is:

Because rational decisions upon scientific questions are not customarily rendered by courts as at present constituted. Hence the aim and object of the Constitution to encourage progress in scientific and liberal arts is defeated by the common holding of legal facts inharmonious with natural law and antipodal to mechanical effect. Wholesale blackmailing of the public is carried on in the exploitation of unscientific decrees rendering the situation intolerable.

The report of the Patent Law Association on the Oldfield Bill, page 8, February 15, 1913, says:

"That patent litigation is expensive, results uncertain and decisions conflicting, *must be admitted.*"

Thus, this complaint is not that of a mere engineer as the lawyer—like assumption of Mr. Shelton, would mislead one to infer.

The statutory qualification for the examiner passing on the grant of the patent is that he possess competent scientific ability and legal knowledge combined. That is, familiarity with the subject of the art which determines novelty and knowledge of the

*[This article, by an eminent engineer, in answer to the editorial by our Associate Editor, Mr. T. W. Shelton, is interesting as presenting the viewpoint of a profession vitally interested in a particular class of judicial decisions. The tone of the article bears out the statement of Dean Roscoe Pound, of Harvard, that there is a growing disposition on the part of other learned professions to question the competency of the lawyer to determine scientific problems with which such other professions are more specially familiar.—Ed.]

mechanical principles or natural law of action which differentiates between inventions of the same class.

The qualification of the judge on the other hand who now determines the validity of the patent grant and decrees its scope and effect is that of legal knowledge, *i.e.*, familiarity with the principles of equity which can be intelligently applied only in the light of precise understanding of the state of the art and mechanical laws involved, and the Federal courts without scientific training or knowledge of the arts customarily reverse the Federal Examiner who has ruled upon the matter in the light of his dual qualification.

Thus, before a court, lacking in familiarity with the history of the art and scientific principles involved, the trial for infringement at times is comparable to the Salem trial for witchcraft in Colonial days when the guilt or innocence of the party was determined by the unscientific belief or mechanical ignorance of those who adjudged the case.

The invaluable kind of assistance or duplicity by which opposing counsel put it over the scientific inefficiency of the court is sufficiently warned against by the argument of Mr. Shelton's communciation and his specifications regarding the employment of the right kind of an attorney to put it over. Such a warning is a parody indeed on the equity and justice of the present system of adjudication of scientific causes.

With the rapid advance in the complexity of the scientific arts, frequency of irrational decisions on the equities of patent causes is increasing by leaps and bounds. As a matter affecting the interest of the layman and the dignity of the law, *ex parte* hearings are inadequate for the public weal. The error of presumption of the charge in Mr. Shelton's argument that the writer, as a layman, sought a forum in which the lawyer and his views are excluded can be verified by submitting his refutation to the editor of *Cement and Engineering News* on the specific charges made therein, to-wit, that in

a comprehensive analysis of eight decisions, one by the Supreme Court, four by Courts of Appeal and three by Circuit Courts, twenty-two out of twenty-three engineering questions relating to resistance of materials were erroneously decided therein and each and every erroneous decision constituted a reversal of the holding of the scientifically trained examiners of the United States Patent Office, an inexcusably pitiful record of inefficiency and error.

The lawyer's viewpoint is that the best results may be secured in the adjudication of patent causes by the judge unfamiliar with the art and possessing that judicial temperament arising from perfect lack of information regarding the subject-matter and his determination of the questions at issue through lawyer-like presumption and assumption rather than by the application of scientific laws and principles which he could not be expected to acquire without years of painstaking effort and study, differs indeed from the viewpoint of the engineer.

Lawyer-like presumption is found in Mr. Shelton's assumption that it is well to emphasize that the government is not an accommodating assembly of individual views, but that it is a co-ordinated system of scientific principles so interdependent that the failure of one to function is adversely reflected in every other. It would seem that it is a most accommodating assembly of individual views, indeed, from the divergence of opinion between judicial holdings of the patent office examiners and the Federal Courts in the eight cases analyzed by the writer. Of the co-ordination which Mr. Shelton's theory of the ideal in patent adjudication presumes now to exist, hardly a trace can be found, as the chemist would say, by the most careful analysis. Such lack of co-ordination is the thing to be remedied by the scientific patent court.

It is known that the specialist prepared to pass instantly upon questions in his special line can do so with accuracy and dispatch, whereas the judge pressed with an enormous amount of work is both inaccurate

and lacking in expedition in arriving at his conclusions. In a single decision by a judge whose salary amounts to \$7500 a year, the public is sometimes fleeced one hundred times the amount of his salary in the course of five to eight years, although the patent litigant against whom the judgment of infringement was originally rendered may not be held for a single cent because of the unscientific nature of the decision subsequently to be reviewed in respect to utility of the grant in the accounting before the amount of damages or profits are awarded. The decision on the technical question of infringement is in the meantime exploited, the public blackmailed for years before any step is taken by the courts to eradicate such public nuisances.

Mr. Shelton states faulty decisions often result from neglect of the attorney to file a petition for rehearing. As a practicing attorney he has probably filed such petitions in other than patent causes, and thus is unfamiliar, as the patent litigant is, with the fact that this procedure of the law in patent causes is comparable to the vermiform appendix in the human anatomy—it causes much trouble and expense, but what useful function it performs no man knoweth. The honest patent attorney frankly advises the litigant that the only beneficial result of filing such petition is to pave the way for petition for certiorari to the Supreme Court of the United States, which rarely goes into matters of mechanical fact or disturbs an error of a court of appeals reversing in effect a natural law.

If the five leading patent attorneys whom the writer has employed at different times and requested a citation of a single example where a court of appeals had granted a petition for rehearing because the court had erred in reversing a fundamental law of nature, were unable to discover such an example, perhaps Mr. Shelton will be able to improve on their findings, and if so, his research will be of value and interest alike to the lawyer and engineer.

The argument of Mr. Shelton upon what Thomas Jefferson would say today as to the idea of the scientific man passing upon scientific questions brought before the court is worthy only of the passing remark that Thomas Jefferson's knowledge of the present-day mechanical contrivances would be so archaic that his opinion of the proper method of the trial of the scientific cause would be immediately admitted by him could his shade be interviewed today as beyond the scope of his comprehension. Indeed, the scientific performance of the wireless telegraph and telephone would have resulted very likely in the trial for witchcraft of the inventor responsible therefor had he lived in Thomas Jefferson's day.

We have undoubtedly a very perfect system of rules of equity, rules which are antipodal to each other dependent on the state of facts to which they are to be applied. Court blunders arise in general in applying a correct rule to an assumed state of facts inconsistent with the actual state. This may be illustrated by a further analysis of one of the cases cited in the *Literary Digest*. In this case change of degree was the principle relied upon by the successful attorney. This principle in simple language is that a change in form or proportion of the part increasing the strength of a member does not take it from under a patent unless the change produces a new mode of operation, i.e., a new mechanism. Consider now the case of a flat plate of reinforced concrete with its steel tie in the bottom. The steel takes tension and the concrete compression, an ancient principle. In resisting bending, tension and compression of flexure are held in equilibrium by horizontal shears. Such horizontal shear distortion would be proportional to the summation of the moments from the center toward the end. Hence the greatest horizontal shear distortion occurs at the end or adjacent to the support with the steel in the bottom. Removing the steel from the bottom to the top, anchoring it by continuity from rigidity to the support and dropping it to the bottom at mid-span, pre-

sents a condition of restraint resisting negative bending at the support, and resisting positive bending at the bottom at the center of the span. Now horizontal shear intensity is still proportional to the summation of the moments, but will be greatest not adjacent to the support with restrained or continuous beams or plate, but at the line of inflection where the curvature changes from convex upward to concave upward and will be zero at the support. Hence the coaction of the metal and concrete is antipodal in the two cases. They constitute a different mechanism according to the simplest and most elementary mechanical principles and any court holding to the contrary is reversing fundamental laws of equilibrium for which the Federal Courts appear to possess unlimited contempt.

Again, not only did this court hold that placing the steel in the top was the plain mechanical equivalent of putting it in the bottom, but that its lateral position was immaterial, although in one case anti-clastic curvature is produced and synclastic curvature as the inherent result of its disposition and location and in the other case. The court thus erroneously reversed the technical examiner of the patent office as to the difference in means which the different lateral arrangements entailed.

The distribution of this decision, containing the judicial holding that putting the steel in the top of a concrete floor was the plain mechanical equivalent of putting it in the bottom, involves a potential menace to the public safety. A not over-bright foreman might assume that the court was correctly advised in the matter, and following the legal facts of the decision, reverse the position of the steel in the engineer's design from the top to the bottom, where it should not be, and from the bottom to the top, where it should not be, and thus destroy the safety of the structure, and menace the lives of the workmen or tenants or perhaps kill a dozen or more of them.

In his contention that the patent should be interpreted by the lawyer, Mr. Shelton

disagrees with the holding of the Supreme Court of the United States in *Carnegie v. Cambria*:

"The patent is not addressed to lawyers, or even to the public generally, but the manufacturers of steel and any description which is sufficient to apprise them in the language of the art of the definite feature of the invention * * * is sufficiently definite to sustain the patent."

If the Supreme Court has the right idea of the matter, the patent should be valid if it is not understood by the lawyer and can the lawyer-judge properly interpret it unless the specialist is called in to help?

These are matters upon which the layman would like some information which would clear up the nebulous nature of the ideals of the legal fraternity regarding the best mode of procedure in such cases.

Upon this question of the meaning of the language, the Eighth C. C. A., in the case referred to in the *Literary Digest*, held that "in the construction of patents and in the application of the law to the facts it presents words must be given the same meaning that the patentees gave them and must be used to designate the same things they used them to designate, or nothing but confusion and mystification can result."² Then after stating the correct principle the court proceeded at once to give the terms used by the patentee not the meaning the patentee gave them, but entirely different meanings and involve all the mystification and confusion in their holding that they predicted would result from such procedure, and then reversed the patent office expert ten times out of ten questions considered by them.

Take another case where the patentee referred to what is in common parlance known as the mathematical flat plate. The court stubbed its toe and supposed that such a plate was naturally flat on top and bottom. What was referred to by the engineers was one which was not flat at all, but operates on the principle of the shell. Take, for instance, a slice of the baby's hollow rubber

(1) 185 U. S. 403, 46 L. Ed. 968.

(2) *Drum v. Turner*, 219 Fed.

ball and bend it in one direction. it flattens out in the other. Bend it in both directions at the same time and the change of curvature is reduced by more than half that which would occur with one force only acting. It was this kind of bending and this kind of disposition of the steel which imitated the action of the homogenous flat plate for the first time in the history of the art in the patent which this same court in one decision first held to be an aggregation of unpatentable elements on 1894 references and then held the same litigant later had infringed the unpatentable as embodied in a true and valid patent of the year 1902, and to cap the climax of consistency the same jurist who held the thing unpatentable on the art of 1894 has been engaged as presiding judge of the circuit court for three and one-half years, trying to determine how much in the way of damages and profits the poor litigant is to be assessed for infringing the thing which he himself has held unpatentable. In the meantime the public at large have been blackmailed of three quarters of a million dollars for alleged royalty in the use of the impractical device which the holders of the paper patent have in the accounting frankly admitted they have never seen, used or tested, and again it was the wide commercial use of the patented thing which had never been used or tested that somehow convinced the court it was the product of the genius of the inventor. Verily when one delves into the musty volumes of the *Federal Reporter* in the field of scientific research he may be pardoned if he uses the expression of the editor of the *Engineering News Record*, that his impression of the contrarieties of our judicial decrees made him feel like "Alice in Wonderland."

Having pointed out some of the difficulties that affect our system; having agreed with Mr. Shelton that the court of patent experts objected to by President Taft is impractical, what then is the engineer's idea? Can we not learn from our former German friends to call on scientifically trained men

in a questionnaire to determine the state of facts and then call on our excellent judges to apply the law to the actual facts presented by the case at bar. Members of the technical societies of the highest rank in the Teutonic countries donate their services as a matter of patriotic duty to the public in determining the issue of the patent causes by answering without charge, frequently making exhaustive reports in reply to these questionnaires with the result that the patent in those countries is more than the plaything of the patent pirate, and actually encourage the art by delivering a definite reward to the real inventor instead of leaving him stranded and disappointed, robbed, injured in credit and reputation by the unscrupulous attacks encouraged by the present inefficient system of patent adjudication.

The underlying difficulty with all questions of mechanics lies in the fact that natural laws are not in general apparent, but hidden. Thus, the remarkable philosopher Galileo was punished by the court because of his teaching the doctrine that the earth moved around the sun. The court believed they could see the sun revolving around the earth every twenty-four hours, and punished the presumptuous philosopher for his theory to the contrary. The inventor's experience in the present-day courts is a duplication of that of the philosopher in the dark ages.

Mechanical truth in present-day courts is tested not by mathematical rules and principles of exact science, but by the belief of the court in honesty of the witnesses.

This is the method by which criminal cases are adjudicated, and is the only method by which such cases, questions of specific performance of contract, and similar matters of equity, can be logically determined. In the technical cause, however, the honesty of the witness does not determine mechanical truth. In fact, it is in nowise related to it. The witness may be honest, but wholly ignorant of the matter concerning which he gives testimony. How then can a non-technical judge be expected to

arrive at correct conclusions, unless the court is equipped to apply mathematical reasoning and separate mechanical truth from honest misconception.

An advantage which a technical court of appeals would have over the present method, would lie in the application of philosophic truths and fundamental natural laws as a means to determine, not the honesty of the technical testimony given, but the accuracy and scientific truth thereof upon which, under the theory of the law, such matters should be determined.

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RAILROADS—FEDERAL CONTROL.

MISSOURI PAC. R. CO. v. AULT.

Argued and Submitted March 22, 1921. Decided June 1, 1921.

41 Sup. Ct. 593.

Within Federal Control Act, § 10, making carriers under federal control subject to all laws and liabilities as common carriers the term "carriers" was used as meaning the transportation systems, as distinguished from the corporations owning or operating them, which is its meaning in common speech, as well as the meaning given by section 1 of the Federal Control Act (section 3115½a), so that section 10 does not make the companies owning the railroads liable as such for acts of the employees of the Director General during the period of federal control.

Mr. Justice Brandeis delivered the opinion of the Court.

A statute of Arkansas provides that whenever a railroad company, or a receiver operating a railroad, shall discharge an employee, with or without cause, it shall pay him his full wages within seven days thereafter and that if payment is not duly made, "then as a penalty for such non-payment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid." Kirby's Digest, § 6649, as amended by Act of 1905, No. 210. Proceeding under this statute, in August, 1918, Ault brought suit before a justice of the peace against the Missouri Pacific Railroad Company, alleging that he had been employed by the company at the rate of \$2.50 per day; that he had been dis-

charged on July 29, 1918, and that \$50 was then due him as wages, but had not been paid. He recovered judgment by default. The company appealed to the Circuit Court and there moved, in January, 1919, to substitute as defendant the Director General of Railroads. This substitution the court refused to make; but it joined the Director General as defendant and entered judgment against both him and the company upon a verdict that Ault recover the sum of \$50 as debt and \$390 as penalty. That judgment was affirmed by the Supreme Court of Arkansas. 140 Ark. 572, 216 S. W. 3.

The President had taken possession and control of the Missouri Pacific Railroad on December 28, 1917, pursuant to the proclamation of December 26, 1917, 40 Stat. 1733, under the Act of August 29, 1916, c. 418, 39 Stat. 619, 645 (Comp. St. § 1974a). He was operating it through the Director General under the Federal Control Act (Act March 21, 1918, c. 25, 40 Stat. 451 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a—3115½p]), when Ault was employed, when he was discharged and when the judgment under review was entered. See Transportation Act 1920, Act of February 28, 1920, c. 91, 41 Stat. 456. The company had claimed seasonably that under the acts of Congress it could not be held liable either for the wages or the penalty and that, if the state and federal statutes should be construed as creating such liability, they were in that respect void as to it under the federal Constitution. The Director General did not contest liability for wages actually due, but claimed that under the legislation of Congress he was not liable for the penalty and that the state statute as applied to him was void under the federal Constitution. The claims of both defendants having been denied by the highest court of the state, they brought the case here by writ of error.

First, the company is clearly not answerable in the present action if the ordinary principles of common law liability are to be applied. The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner companies, but by means of a Director General through "one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing." Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 148, 39 Sup. Ct. 502, 505 (64 L. Ed. 897). This authority was confirmed by the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and the ensuing

proclamation of March 29, 1918, 40 Stat. 1763. By the establishment of the Railroad Administration and subsequent orders of the Director General, the carrier companies were completely separated from the control and management of their systems. Managing officials were "required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration." U. S. R. R. Adm. Bulletin No. 4, pp. 113, 114, 313. The railway employees were under its direction and were in no way controlled by their former employers. See Bulletin No. 4, p. 168, § 5; page 198 et seq.; page 330 et seq. It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner companies as their interest in and control over the systems were completely suspended.

The contention that the company is liable for acts or omissions of the Director General in operating the Missouri Pacific Railroad rests wholly upon the following provision of section 10 of the Federal Control Act (section 3115½j):

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. * * * But no process, mesne or final, shall be levied against any property under such federal control."

It is urged that, since section 10, in terms, continues the liability of "carriers while under federal control" and permits suit against them, it should be construed as subjecting the companies to liability for acts or omissions of the Railroad Administration, although they are deprived of all power over the properties and the personnel. And it is said that this construction would not result in hardship upon the companies since the just compensation provided by the act would include any loss from judgments of this sort. Such a radical departure from the established concepts of legal liability would at least approach the verge of constitutional power. It should not be made in the absence of compelling language. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408, 29 Sup. Ct. 527, 53 L. Ed. 836. There is none such here.

The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except insofar as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917, to cases where the cause of action arose before that date and the suit against the company was filed after it, and to cases where both cause of action and suit had arisen or might arise during federal operation. The government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

This purpose Congress accomplished by providing that "carriers while under federal control" should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore. Here the term "carriers" was used as it is understood in common speech; meaning the transportation systems as distinguished from the corporations owning or operating them. Congress had in section 1 (section 3115½a) declared that such was its meaning. The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such (Bull. No. 4, p. 113). Each system was required to file its own tariffs. General Order No. 7, Bull. 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, Id. p. 170. Each federal treasurer was to deal with the finances of a single system; his bank account was to be designated "(Name of Railroad), Federal Account." General Order No. 37, Id. p. 313. Each of 165 systems was named individually in the order promulgating the wage awards of the Railroad Wage Commission. General Order No. 27, Id. pp. 198, 200. And throughout the orders and circulars there are

many such expressions as "two or more railroads or boat lines under federal control." See General Order No. 11, *Id.* p. 170. It is this conception of a transportation system as an entity which dominates section 10 of the act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the government.

Thus, under section 10, if the cause of action arose prior to governmental control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue, or the time for trial. If the cause of action arose while the government was operating the system, the "carrier while under federal control" was nevertheless to be liable and suable. This means, as a matter of law, that the government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. See *Gracie v. Palmer*, 8 Wheat. 605, 632-633, 5 L. Ed. 696. The title by which suit should be brought—the person who should be named as defendant—was not designated in the act. In the absence of explicit direction, it was perhaps natural that those wishing to sue the carrier should have named the company as defendant when they sought to hold the government liable. It doubtless seemed, as suggested in *McNulta v. Lochridge*, 141 U. S. 327, 331, 332, 12 Sup. Ct. 11, 35 L. Ed. 796, that suit should be brought against the transportation company "by name 'in the hands of' or 'in the possession of' a receiver," or Director General. All doubt as to how suit should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name.

As the Federal Control Act did not impose any liability upon the companies on any cause of action arising out of the operation of their systems of transportation by the government, the provision in Order No. 50, authorizing the substitution of the Director General as defendant in suits then pending within his power; the application of the Missouri Pacific Railroad Company that it be dismissed from this action

should have been granted; and the judgment against it should, therefore, be reversed.

Second, the contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute is rested specifically upon the clause in section 10 to the effect that the carriers "shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law," and the provision in section 15 (section 3115 $\frac{1}{2}$) that the "lawful police regulations of the several states" shall continue unimpaired. By these provisions the United States submitted itself to the various laws, state and federal, which prescribed how the duty of a common carrier by railroad should be performed and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined. But there is nothing, either in the purpose or the letter of these clauses, to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed. The government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the government's railway employees. The Director General adopted a much more effective and direct method:

"Now that the railroads are in the possession and control of the government, it would be futile to impose fines for violations of said laws and orders upon the government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishments for willful and inexcusable violations thereof upon the person or persons responsible therefor." General Order No. 8, *Id.* p. 167.

The purpose for which the government permitted itself to be sued was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order:

"Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures."

Judgment reversed.

NOTE.—Liability of Carriers While Under Federal Control.—Liability for a railroad carrier's transaction and for a breach of duty, such as

negligence, during the period of federal control is that of the United States, and no cause of action therefor exists against the railroad company under the Federal Control Act of March 21, 1918. *Hines v. Bellah*, Ga. App., 106 S. E. 559; *Ellis v. Atlanta, B. & A. R. Co.*, 270 Fed. 279; *Texas & N. O. R. Co. v. Clerenger*, Tex. Civ. App., 223 S. W. 1036; *Pullman Co. v. Sweeney*, 269 Fed. 764; *Hines v. Collins*, Tex. Civ. App., 227 S. W. 332; *Morrell v. Northern Pac. R. Co.*, N. D., 179 N. W. 922.

This liability extends to injuries to an adjoining land owner from being burned while attempting to stamp out fire started by sparks from a locomotive. *Hines v. Bellah*, Ga. App., 106 S. E. 559.

But it has been held that an injured employee was in the employ of defendant railroad regardless of the relation of the United States to the physical property of the railroad, and that he could sue the company on account of his injuries. *Hite v. St. Joseph & G. I. R. Co.*, Mo., 225 S. W. 916.

A railroad company whose property is under federal control is not subject to indictment for violation of a statute in regard to maintenance of waiting rooms. *Com. v. Louisville & N. R. Co.*, Ky., 224 S. W. 847.

This rule extends to telegraph and telephone companies while in control of the government. *Amerson v. Western Union Tel. Co.*, 265 Fed. 909; *Western Union Tel. Co. v. Grover*, Ala. App., 86 So. 154; *McKeena's Admr. v. Paris Home Tel. & Tel. Co.*, Ky., 227 S. W. 450; *Texas Telephone Co. v. Mart*, Tex. Civ. App., 226 S. W. 497; *Western Union Tel. Co. v. Robinson*, Tex. Civ. App., 225 S. W. 877; *Western Union Tel. Co. v. Johnson*, Tex. Civ. App., 224 S. W. 203.

"In conferring upon the President power 'to take possession and assume control of the telegraph systems, the resolution adopted language identical with that which had been employed in the Act of August 29, 1916, c. 418, 39 Stat. 619, 645 (Comp. St. § 1974a), pursuant to which the railroads were brought under federal control. See *Missouri Pacific Railroad Co. v. Ault*, 254 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —, decided June 1, 1921. We held there that the supplementary legislation known as the Federal Control Act did not impose liability upon the company, and that, since the Government was operating the property, the railroad company could not be held liable under the established principles of the common law governing liability. These principles are equally applicable here.

"In respect to telegraph systems there was no supplementary legislation similar to the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 311534a—311534p); so that the argument mainly relied upon by plaintiff in the *Missouri Pacific Case* is not made here. But it is contended that the proclamation, the order of the Postmaster General of August 1, 1918, and the contract between him and the company concerning compensation, authorized suit against the company as the operating agent of the government in the same way that the Federal Control Act authorized suit against the Director General. We find in them no basis for such liability. Obviously neither proclamation, order, nor contract could create a liability not author-

ized by the resolution of Congress on which they rest. Nor did they attempt to do so.

"It is urged that telegraph companies should be held liable because otherwise those using the system would be without remedy for losses suffered thereby. Whether this is true, or whether under the Tucker Act (24 Stat. 505) the sender of a message would have a remedy in the Court of Claims or in a federal District Court, we have no occasion to consider in this case. If Congress has omitted to provide adequately for the protection of rights of the public, Congress alone can provide the remedy." *Western Union Tel. Co. v. Poston*, 41 Sup. Ct. 598.

ITEMS OF PROFESSIONAL INTEREST.

THE NOVA SCOTIA TERCENTENARY.

On the fifth of August, 1621, a royal charter was granted to New Scotland, now called Nova Scotia. This new colony was set up as a separate sphere of influence in the new world in competition with New England and New France. This will be celebrated in Nova Scotia on August 31, 1921, the date being postponed to accommodate the Canadian Bar Association, which meets in Ottawa the first week in September and to make it more convenient for members of the American Bar, who will be guests at that meeting after attending the celebration at Nova Scotia.

The place of the celebration is Annapolis Royal, N. S., because at this place, 200 years ago, the first British court of judicature in any part of what is now Canada was held in August, 1721. The Annapolis Valley and the neighboring Evangeline country made famous by Longfellow are considered the beauty spots of Eastern Canada. An interesting fact about this court was that it was ordained that the "Laws of Virginia" should be followed. A student of history will find that Virginia, through her "laws" and traditions, exercised a great influence upon the Maritime Provinces and eventually upon all of Canada. In founding this new province, which was peopled by professed subjects of England who had no grievance against their motherland, it was found that the best pattern of English law adapted for colonial purposes was that gradually developed in Virginia. The Virginia colony had been founded by Sir Walter Raleigh in order to strengthen Britain's hold upon another portion of the habitable globe and to thwart the colonization schemes of France and Spain. Its foundation principle was not to afford protection for any particular creed, but

to establish religious freedom for all. The purpose of the Virginia enterprise was described as "an action concerning God and the advancement of religion, the present ease, future honor and safety of the Kingdom, the strength of the navy, the visible hope of a great and rich trade, and many secret blessings not yet discovered." Those who lived under the Raleigh patent were given all the privileges of natives and residents of England, and Raleigh and his heirs and assigns were given the power to govern and rule according to his own statutes, laws, and ordinances, providing only that such laws be as near as convenient to current English law and policy.

The Virginians followed out this program so constructively that the British government was able to prescribe Virginia laws as a model for the new Nova Scotia colony. The colonies of Massachusetts and Pennsylvania, founded by religious dissenters, were not in the same close harmony with English policy, which accounts for the preference of Virginia "lawes."

The fact that Virginia barely survived the first example of socialism in practice upon this continent has a great deal of present-day interest in view of the Bolshevik experiment and the current advocacy of socialistic theories, and may have been a further test which made the resulting Virginia laws more desirable to the Nova Scotians. Most of the historical documents of these early years have been unearthed and preserved through the efforts of the Hon. Mr. Justice Chisholm of Nova Scotia, who is a member of the American Archaeological Society.

REPORT OF MEETING OF NORTH CAROLINA BAR ASSOCIATION.

The twenty-third annual meeting of the North Carolina Bar Association was held July 5, 6 and 7, at Selwyn Hotel, Charlotte, N. C., where addresses were delivered by the President, Mr. Thomas W. Davis, of Wilmington, N. C., "The Bar, Its Benefits and Its Blessings"; Mr. I. M. Bailey, of Jacksonville, N. C., "The Bar Association's Influence on Young Lawyers," and Mr. Thomas C. Guthrie, of Charlotte, N. C., "The Influence of Lawyers." The annual address was delivered by Mr. Junius Parker, of the New York Bar, "Increasing Governmental Activities."

The newly elected officers are President John A. MacRae, Charlotte; Vice-Presidents, H. L. Stephens, of Warsaw; T. E. Raper, of Lexington; J. W. Pless, of Marion; Henry M. Lon-

don, of Raleigh, Secretary and Treasurer. The delegates to the American Bar Association are H. F. Seawel, of Carthage; Chief Justice Walter Clark; W. E. Brock, of Wadesboro, while the alternates are T. T. Hicks, of Henderson; W. M. Hendren, of Winston-Salem, and Frank Thompson, of Jacksonville. The delegates to the conference of state and local bar associations are W. P. Bynum, of Greensboro; Clement Manly, of Winston-Salem; Thomas W. Davis, of Wilmington, while the alternates are Thomas C. Guthrie, of Charlotte; G. S. Bradshaw, of Greensboro, and E. S. Parker, of Graham.

As members of the Executive Committee, there were elected R. L. Smith, of Albermarle, and A. L. Quickel, of Lincolnton, who, with the President, the Secretary, E. W. Timberlake, of Wake Forest (1922); Frank Thompson, of Jacksonville (1922); Mark W. Brown, of Asheville (1923), and E. S. Parker, of Graham (1923), composed the Executive Committee.

CORRESPONDENCE.

A LEGISLATIVE PUZZLE.

Editor, CENTRAL LAW JOURNAL:

Chapter 121, Laws 1919, of the New Mexico Legislature, refers to a commission form of government for municipalities. Section 1 of Article 2 of the Act provides: "The governing body of any such city shall district such city into FIVE districts for the purpose of the selection of commissioners, each district to be compact in area and to ADJOIN each other district, and to be as nearly as possible of the same territorial size, and one commissioner shall be selected from each district who shall run at large in the city in order that the said city may have a representative form of government," etc. Puzzle No. 1, how can the five proposed compact same-sized districts be made to adjoin each other district? Please diagram. Puzzle No. 2, how can one commissioner of a total of five be selected from each of five districts, district lines being disregarded and each voter privileged to vote for five commissioners and no restriction as to number of candidates? Assuming ten candidates, or only six for the five jobs and one or more from each district nominated and "running at large" over city (districts by area and not population), is there any conceivable way of assuring each district a commissioner, or any reason why the most populous of the five districts may not nominate and elect five commissioners, all from this most populous district?

These are live questions in several towns in New Mexico without solution so far; all answers appreciated. The writer is a subscriber to and regular reader of your publication and prefers to remain "incog" and hopes to read your views in an early issue.

Albuquerque, N. Mex.

INQUIRER.

[The editor worked on this "puzzle" until he began to see "red." Will some of our readers assist our "inquirer" to solve his problem?]

BOOK REVIEWS

CORPUS JURIS, VOL. 24.

Volume 24 of Corpus Juris, which has just come from the press, deals wholly with the subject of Executors and Administrators, and together with Volume 23, constitutes a very valuable and exhaustive treatise on this subject. The treatment of this subject commences at page 984 of Volume 23, and covers 223 pages of that volume and 1223 pages of volume 24, a grand total of 1446 pages, equal to nearly 2500 pages of an ordinary law book. The work is done by James Walter Magrath and is a testimonial to his immense energy, not only in gathering together such an enormous mass of authorities and in arranging and classifying them under proper text statements of the law, but in distinguishing the facts by appropriate and succinct paragraph quotations in the notes. The notes in Corpus Juris, by the way, are a delight to the practicing lawyer. They save much labor in the careful distinctions they make between the facts in cases where the same principle seems to be involved, but different results are reached because of some slight variation in the facts. Modern life is so complex in its relationships and social obligations that greater care must be taken by courts and lawyers in applying general principles of law to special states of fact.

The discussion of the subject of Executors is under the following 26 headings: 1, Administration in General; 2, Appointment, Qualification and Tenure; 3, Assets; 4, Inventory and Appraisal; 5, Authority and Duties in General; 6, Discovery of Assets; 7, Collection of Assets; 8, Custody and Management of Estate; 9, Allowance to Surviving Spouse or Children; 10, Allowance and Payment of Claims; 11, Distribution of Estate; 12, Sales Under Order of Court; 13, Insolvent Estates; 14, Actions; 15, Accounting and Settlement; 16, Liability on Administration Bonds; 17, Foreign and Ancillary Administration; 18, Administrators de

Bonis Non; 19, Administrators With the Will Annexed; 20, Temporary or Special Administrators; 21, Co-Executors and Co-Administrators; 22, Representatives of Deceased Executors or Administrators; 23, Public Administrators; 24, Collectors and Receivers; 25, Independent Executors; 26, Executors de Son Tort.

One volume of 1224 pages and bound in dark buckram.

HUMOR OF THE LAW.

"What shall we say of this representative in Congress?"

"Oh, say he's a two-fisted American."

"But it's a lady."

Over a paint and oil shop was hung the usual warning, "Do not smoke." A man by the name of Parnell protested against the notice to the manager, Hawksworth, and this is their conversation reduced to verse (sic):

"I crave a smoke," says John Parnell,

"A darned sight worse than I can tell.

"Your sign, C. H., I love like—well."

Says Hawksworth to John A. Parnell,

"Your craving you had better quell;

"If you smoke here you'll smoke in—well."

"Constable," said the Magistrate of the little English town, frowning darkly in his effort to look wise, "What is this man charged with?"

"Bigotry, your worship. He's got three wives."

"Constable," said the magistrate, "you should be more exact. Why have we instituted evening schools for our police force if not to teach you that when a man has three wives he has committed, not bigotry, but trigonometry?"

And the prisoner turned a shade paler as he realized the wisdom of the Judge.—*Pittsburgh Chronicle-Telegraph*.

Some years ago Congress enacted a law, or was it a departmental regulation, whereby a homestead entryman who had entered less than 160 acres, but who had taken all of the available land, could, if contiguous land subsequently became vacant, complete his quarter section from it.

A man rushed into the local land office with:

"Say, I got a hundred and twenty acres in my homestead, an' there's a forty contagious to it, and I want to know if I can take it."

"Well," said the Register, thoughtfully, "if it's contagious, I guess you can take it."

—*The Docket*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Attachment—Loss by Fire.**—Plaintiff in attachment was not liable for loss of goods by fire after sheriff had taken possession under the writ, unless the fire was caused by plaintiff directly or by the negligence of the sheriff to which the plaintiff directly contributed.—*Fair v. Beal-Burrow Dry Goods Co., Ark., 230 S. W. 23.*

2. **Attorney and Client—Disbarment.**—A disbarment proceeding tried before Laws 1919, p. 151, went into effect, was under Rev. St. 1909, § 960, under which no final judgment suspending for a definite time could be made for an indictable offense in the absence of indictment and conviction, and a disbarment or suspension for 12 months is such a final judgment, since it does not suspend until indictment might be secured and trial had thereon, but finally disposes of the case charging costs to party disbarred.—*Jones v. Sanderson, Mo., 229 S. W. 1087.*

3. **Disbarment.**—In a case where the court would have discretion to hear disbarment proceedings before the trial of the attorney on an indictment for the same acts, the acquittal of the attorney does not prevent his disbarment, since the parties, issues, and quantum or proof necessary are different in the two proceedings.—*In re O'Brien, vt., 113 Atl. 527.*

4. **Interest on Claim.**—In an attorney's action for professional services, it was error to allow plaintiff interest, where the claim was unliquidated, and there was no method by which the amount to which the plaintiff was entitled could be computed, so that payment thereunder might have been made.—*Blackwell v. Finlay, N. Y., 182 N. Y. S. 881.*

5. **Right of Associate Attorneys.**—Where a number of attorneys were associated in the conduct of litigation, one of them could not, by accepting from their joint client less than a reasonable fee, deprive the other attorneys of a reasonable fee.—*Snell v. Frank Snell Sawmill Co., U. S. D. C., 271 Fed. 696.*

6. **Bankruptcy—Misappropriating Proceeds.**—Where plaintiff furnished defendant fertilizer for sale, under an agreement that it was to remain plaintiff's property until sold or settled for, and that all proceeds of sales, including accounts and collections, were to be held for its use and to be its property until all indebtedness was paid, and accounts from sales were assigned to plaintiff, but collected by defendant, defendant's liability, in suit for conversion for misappropriating the proceeds of collections, was

not one released by defendant's discharge in bankruptcy.—*Baker v. Bryant Fertilizer Co., U. S. C. C. A., 271 Fed. 473.*

7. **Preference.**—Where bankrupt, a broker, on the day of the filing of his petition in bankruptcy, obtained delivery of bonds at his office by messenger on promise of cash payment, a check given in part payment on the same day, though after filing of the petition, held not a "preference," under Bankruptcy Act, § 60a (Comp. St. § 9644), for preference implies paying or securing a pre-existing debt of a person preferred, and where one gives an insolvent person value for a transfer of property, or where he makes an exchange of property, there is no preference.—*In re Perpail, U. S. C. C. A., 271 Fed. 468.*

8. **Voluntary Bankrupt.**—After a receiver has been appointed for a corporation by a state court, under authority of the laws of the state, with power to take possession of and hold the property of the corporation, its directors are without power to authorize the filing of a petition in voluntary bankruptcy and the surrender of its property to the bankruptcy court.—*In re Associated Oil Co., U. S. D. C., 271 Fed. 788.*

9. **Banks and Banking—Application of Deposit.**—A bank cannot exercise an option given it to charge the amount of a note discounted for a depositor to the latter's account at maturity, where prior to such maturity the depositor has gone into the hands of a receiver and the rights of others have intervened.—*First Nat. Bank of Kansas City, Mo. v. Seidomridge, U. S. C. C. A., 271 Fed. 561.*

10. **Identification of Payee.**—A telegraph company issuing a draft or order, in effect waiving identification of the payee, by indorsement of its authorized agent that payee was identified by him, is liable to bank paying it, whether or not the person presenting it and indorsing it was the payee.—*Mackay Telegraph-Cable Co. v. Fort Worth Nat. Bank, Tex., 230 S. W. 244.*

11. **Ownership of Draft.**—Where the payee bank allowed the drawer of drafts with bill of lading attached to check out the proceeds thereof, the bank became the owner of the instruments, and, the payee having deposited payment in a foreign bank, a creditor of the drawer of the drafts cannot attach the funds, for such moneys are the property of the payee bank alone.—*Union Nat. Bank v. Maines-Hough Motor Co., Col., 197 Pac. 753.*

12. **Bills and Notes—Estoppel.**—The maker of a non-negotiable note is not estopped, merely because he knew that it might be assigned or disposed of, to assert against the transferee any defenses available against the payee where he did not assure the transferee of its validity, etc.; for the note carried on its face a warning that defenses might be urged.—*Farmers' Nat. Bank v. Stanton, Iowa, 182 N. W. 647.*

13. **Carriers of Goods—Lawful Rate.**—The party liable for the charges on an interstate shipment is conclusively presumed to know the lawful rate.—*Montpelier & W. R. R. v. Charles Bianchi & Sons, Vt., 113 Atl. 534.*

14. **Conspiracy—Plan by Unions.**—A plan by unions, such as that of longshoremen, acquiesced in by shipping companies, not to handle the products of plaintiff, a non-union employer, and thus to prevent transportation, is a conspiracy, which is defined as a combination by two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means.—*Burgess Bros. Co. v. Stewart, N. Y., 182 N. Y. S. 873.*

15. **Constitutional Law—Due Process.**—Acts 36th Leg. (1919), c. 160, § 9, making it a crime to discharge an employe because of testimony given before the industrial welfare commission, was not in violation of the due process of law clauses of Const. U. S. Amends. 5, 14, and state Const. art. 1, § 19.—*Poye v. State, Tex., 230 S. W. 161.*

16. **Fixing Wages.**—A law fixing the wages of certain classes of railway employees tem-

porarily pending a hearing, for the purpose of avoiding a strike, is a valid regulation of commerce.—*Birmingham T. & Sav. Co. v. Atlanta, B. & A. Ry. Co.*, U. S. D. C., 271 Fed. 731.

17.—**Regulation of Barbering.**—In so far as the practice of barbering is concerned, the public welfare and comfort—outside of what is included in its health and safety—are so insignificant as not to lend color to any right of regulation claimed under the police power of the state.—*Timmons v. Morris*, U. S. D. C., 271 Fed. 721.

18.—**Revocation of License.**—As the operation of a place of amusement on private property involves nothing inherently evil, and the limit of legislative power thereover is to regulate only, an ordinance authorizing the city council to revoke amusement licenses at pleasure, without fixing any standard whatsoever and giving perfect freedom to exercise favoritism, is invalid notwithstanding Rem. Code 1915, § 7507, subsec. 33, relating to licenses, for such ordinance is discriminatory and violates Const. U. S. Amend. 14, and Const. Wash. art. 1, §§ 3, 12, prohibiting deprivation of property without due process, etc.—*Vincent v. City of Seattle, Wash.*, 197 Pac. 618.

19.—**Damages—Breach of Contract.**—Owner of retail millinery business excluded from defendant's department store in violation of contract held entitled to recover loss of profits during remainder of term if he had not failed to perform substantial part of contract himself. *Stronge Warner Co. v. H. Choate & Co.*, Minn., 182 N. W. 712.

20.—**Injury to Crop.**—Measure of damages where there is negligent injury to a growing crop is the market value at the time of maturity, less the cost of tilling, harvesting, and marketing.—*Brace v. Pederson, Wash.*, 197 Pac. 625.

21.—**Deeds—Ratification.**—Husband's failure to bring action to set aside deed to wife obtained by threats of violence and death by wife and third person, where the reason for the delay was his desire to wait until the termination of the prosecution of the third person for felonious assault, in which case he was the prosecuting witness, without having indicated during such time an intention to ratify the deed, held not a ratification of the deed on ground of acquiescence.—*Bray v. Haskins, Mo.*, 229 S. W. 1074.

22.—**Electricity—Ownership of Bridge.**—A railroad company, which maintained an electric wire across the top of a bridge spanning its tracks, is not relieved from its duty to guard the wire, for the protection of children attracted to climb on top of the bridge, by the fact that the bridge was not owned by the company, and that it was the bridge, and not the wire, that was the real attraction.—*New York, N. H. & H. R. Co. v. Fruchter*, U. S. C. C. A., 271 Fed. 419.

23.—**Executors and Administrators—Attorney's Fee.**—The value of an estate does not warrant the allowance of excessive fees to the executor's attorneys, but is a factor to be taken into consideration in determining the proper amount to be allowed, as to some extent it fixes the responsibility resting on the attorneys.—*In re Matthews' Will, Wis.*, 182 N. W. 744.

24.—**Fixtures—Temporary Buildings.**—Where the widow of a decedent permitted by the court to remain in possession of a farm pending the settlement of the estate, built a root house for her own convenience, she had a right to remove it.—*In re Bloor's Estate, Wash.*, 197 Pac. 614.

25.—**Frauds, Statute of—Memorandum.**—In order to recover for the breach of a verbal contract of sale of goods within the statute of frauds, where the memorandum is not signed by the defendant, the writing containing his signature must connect itself with the memorandum, or must with other writings be so connected therewith, by reference or internal evidence, that parol testimony is not necessary to establish the connection with the verbal contract of

sale; or else, if the signature was not appended to the writing for the purpose of becoming a part of the memorandum, the writing, in order to satisfy the statute, must clearly admit or confess that a sale was made.—*Quinn-Shepardson Co. v. Triumph Farmers' Elevator Co.*, Minn., 182 N. W. 711.

26.—**Homestead—Partition.**—Under Rev. St. 1919, § 7547 et seq., providing that when a party as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest on a sum of money, or to the use of any estate, and is willing to accept a gross sum in lieu of the use, the sum shall be estimated in the manner therein provided, in a suit by a widow and minor son, the minor son's interest could not be ascertained in land of which his mother as widow had a homestead, nor was the widow's interest in the proceeds of the homestead susceptible of ascertainment under such sections.—*Schlup v. Thrasher, Mo.*, 229 S. W. 1094.

27.—**Husband and Wife—Badge of Fraud.**—Where a husband abandoned his wife, and for years kept out of the state, paying no attention to the needs of his family, the wife supporting them, and, when his mother died and left him one-fourth of her estate, transferred such estate to his brother a few days before attachment was issued, such transfer showed badges of fraud, and the property was subject to the attachment by the wife.—*Heidelberger v. Heidelberger, N. Y.*, 182 N. Y. S. 864.

28.—**Injunction—Striking Employees.**—An employer is entitled to the utmost freedom in selecting his employees, and all citizens have the right to pursue lawful trades or callings; therefore, a combination by striking employees to prevent by means of threats, intimidation, etc., others from taking their places, is illegal, and will be enjoined.—*Grand Shoe Co. v. Children's Shoe Workers' Union, N. Y.*, 182 N. Y. S. 867.

29.—**Insurance—Accidental Death.**—In action under accidental policy, beneficiary was entitled to recover under a finding that "the wrenching and straining of deceased's body by the violent, as aforesaid, exertion in shaking the furnace, was accidental and unintentional on his part, and was unforeseen and unexpected by him and said hemorrhage was from the rupture of a blood vessel or artery in his lung, and was caused by said violent and accidental means, and which did, independently of all other causes, result in his direct and immediate death."—*Husbands v. Indiana Travelers' Acc. Ass'n, Ind.*, 130 N. E. 874.

30.—**Assignment of Policy.**—In a suit to set aside for fraud an assignment of a life insurance policy to a decedent, plaintiff held not entitled to recover interest on value of the policy; premiums in the meantime having been paid to protect the policy.—*Lewery v. Simpson, N. Y.*, 182 N. Y. S. 865.

31.—**Burden of Proof.**—Where, after taking out a life policy providing for payment of extra premium in case of entry into military service, insured entered such service, but neither he nor his wife, the beneficiary, paid the extra premium required, relying on the representations of the insurer's agent and his assistant that the insurer would not rely on the military service clause, but such agreement or statement on the part of the agent and assistant was unauthorized, it did not effect a waiver binding on the insurer.—*McCoy v. National Life Ins. Co., Iowa*, 182 N. W. 659.

32.—**Deposit of Premiums.**—Revised Statutes 1919, § 6145, requiring insurer to tender or return premiums before interposing the defense of insured's misrepresentations, does not apply to fraternal beneficiary associations, in view of Insurance Law, art. 15, exempting fraternal beneficiary associations from provisions of the insurance laws.—*State v. Reynolds, Mo.*, 229 S. W. 1057.

33.—**False Answer.**—The fact that the certificate, containing a copy of the application and the answer mentioned, was retained for three months without objection, is not, as a

matter of law, conclusive that the insured adopted the false answer as her own; the testimony being that she could not read and did not understand the English language.—*Gruberski v. Brotherhood of American Yeomen, Minn.*, 182 N. W. 716.

34.—**Failure to Designate Beneficiary.**—Under by-law providing that the society will not be responsible for payment of death contributions or assessments where the deceased member fails to designate any person, if the beneficiary designated is ineligible, as where she is the member's concubine, the amount of the policy is not payable to the member's heir or heirs included among the persons entitled to the benefit under the charter, and the society is not liable for the payment of any death benefit; and this non-liability is not affected by the fact that it has levied the contribution or assessment for the death; its only duty in such case being to return to the living members the contribution thus levied upon them without authority.—*Walker v. Young Men's St. Michael's Mut. Aid & Benevolent Ass'n, La.*, 88 So. 232.

35.—**Increase of Assessments.**—In an action upon a fraternal benefit certificate, the beneficiary will not be heard to claim that the insured was excused from paying or tendering assessments, because the amount thereof was increased by an amendment to the by-laws not validly enacted, in the absence of evidence that payment thereof was tendered at the rate established prior to the attempted amendment.—*Jensen v. Grand Lodge of A. O. U. W., Neb.*, 182 N. W. 599.

36.—**Insurable Interest.**—A son-in-law had no insurable interest in the life of his father-in-law from the mere fact that the father-in-law lent son-in-law money and was willing to lend him more, coupled with the fact that he was kindly disposed towards him, and benefit certificates obtained by son-in-law were mere wager policies and void.—*Home Mut. Ben. Ass'n v. Keller, Ark.*, 230 S. W. 10.

37.—**Law of State of Delivery.**—A life insurance policy, delivered in the state where insured resided, became a contract of that state, governed by its laws.—*Lanxlev v. Prudential Ins. Co., U. S. D. C.*, 271 Fed. 776.

38.—**Intoxicating Liquors—Contradictory Evidence.**—An indictment for illegally selling whiskey need not name the person to whom the alleged sale was made, even since the offense has been raised to the grade of a felony.—*Garrison v. State, Ark.*, 230 S. W. 4.

39.—**Landlord and Tenant—Rent Regulation.**—When, by reason of disordered conditions due to the war and to the federal war powers, the people of New York City could find no other homes than those they possessed, and were threatened with ejectment or dispossession except upon payment of exorbitant rents, the Legislature had power to stay any and all proceedings while the danger or peril lasted, the owners receiving fair compensation meanwhile, but such laws are effectual only while the necessity demands them.—*Gutttag v. Shatzkin, N. Y.*, 130 N. E. 929.

40.—**Libel and Slander—"Libelous Per Se."**—Words charging an unmarried woman with incontinence are actionable per se, even when no special damages are pleaded.—*Ernst v. Eltgroth, Minn.*, 182 N. W. 709.

41.—**Licenses—"Manufacturer."**—A city directory company engaged in compiling the names for the city directory and in selling the directories and advertising space therein, which turned the manuscript thus compiled with electrotypes and paper over to a bookbinding and book printing establishment, held liable for license tax under Act No. 171 of 1893, not being a "manufacturer" within Const. art. 229, exempting manufacturers from payment of occupational license tax.—*State v. Soard's Directory Co., La.*, 88 So. 251.

42.—**Master and Servant—Assault by Foreman.**—In an employee's action under Civ. Code, art. 2315, for injuries from an assault by his foreman, a plea founded on plaintiff's failure to

allege that notice of his injury was given the employer within six months after the injury and plaintiff's failure to allege that defendant employer refused to pay compensation under the Employers' Liability Act could not avail defendant employer.—*Nash v. Longville Lumber Co., La.*, 88 So. 226.

43.—**Disposition of Award.**—Where the widow and infant son of deceased employee, pursuant to Workmen's Compensation Law, § 29, elected to sue a third person, and judgment of \$4,500 was recovered, together with costs and interest, the principal amount of the judgment should at least be credited on the award to them, although their attorney received a percentage of the recovery.—*Kabel v. Lane Engineering Co., N. Y.*, 187 N. Y. S. 833.

44.—**Liability for Medical Services.**—Where an injured employee had received physician's services and medicines with knowledge that his employer had promised to pay for them as required by the Workmen's Compensation Act, a notice to the employer not to pay for such services would not relieve the employer's liability, and, therefore, would not defeat the effect of receiving such services as an election to accept compensation.—*Talge Mahogany Co. v. Burrows, Ind.*, 130 N. E. 865.

45.—**Negligence of Agent.**—An agent who enters on construction work for his principal is bound to use reasonable care in the manner of executing the work so as not to cause any injury to persons working under him, which may be the natural consequence of his negligence in construction of the structure and its insecurity and dangerous condition, and such agent may not exempt himself from liability to any person who suffers injury by reason of having the work so negligently constructed and left without proper safeguard.—*Wright v. McCord, Ala.*, 83 So. 150.

46.—**Mines and Minerals—Option.**—Under an oil and gas lease, giving lessee the right to drill for the term of one year, with an option to extend the term by payment of a stated sum within the year, the mailing of a check for the sum within the year, which was not received by lessor because incorrectly addressed, held not a valid exercise of the option.—*Gillespie v. Bobo, U. S. C. C. A.*, 271 Fed. 641.

47.—**Municipal Corporations—Dangerous Sidewalk.**—Though plaintiff had previously suffered a fracture of spinal vertebra accompanied with slight displacement of the segments and some resulting paralysis, and though following such injury the segments might have again slipped, increasing the displacement and paralysis, where in fact increased physical impairment was caused by plaintiff's fall on defendant city's dangerous sidewalk, the city is liable for such injury; plaintiff being entitled to recover from the city for all the ill effects which, considering his condition of health, naturally and necessarily followed the injury received by him through the city's negligence.—*Kiefer v. City of St. Joseph, Mo.*, 229 S. W. 1089.

48.—**Defect in Service of Process.**—The filing of an answer for a city by its attorney waived any defect in the service of process by reason of it being served on the city clerk instead of the mayor.—*State v. Hackmann, Mo.*, 229 S. W. 1082.

49.—**Duties of Officers.**—"The duties of municipal authorities in adopting a general plan of drainage, and in determining when, where, and of what size and at what level drains or sewers shall be built, are of a quasi judicial nature, involving the exercise of deliberate judgment and wide discretion; and the municipality is not liable for an error of judgment on the part of the authorities in locating or planning such improvements."—*Harrison Co. v. City of Atlanta, Ga.*, 107 S. E. 83.

50.—**Negligence.**—It is negligence to endanger the public use of a street by erecting or placing upon its margin anything which unnecessarily and unreasonably imperils the safety of those who are lawfully using the public way.—*Blakesley v. Standard Oil Co., Iowa*, 182 N. W. 666.

51.—**Sale of Surplus Electricity.**—Under Los Angeles Charter, art. 1, § 2, subd. 7, 17, 50, authorizing the city to sell electric current and all products of any public utility operated by it, the provision of subdivision 41, that no electric power shall be sold to a corporation for resale or distribution without the assent of the voters, is only a limitation upon the power, not a denial thereof, so that the city may sell its surplus electric current to a corporation for distribution outside the city, if the contract has been approved by the voters.—*Miller v. City of Los Angeles, Cal.*, 197 Pac. 342.

52.—**Street Improvements.**—Assessments for street improvements based on frontage held not unconstitutional, though only repairs were made in front of part of property.—*Asel v. City of Jefferson, Mo.*, 229 S. W. 1046.

53.—**Title to School Buildings.**—The title to public school buildings in territory annexed to a city passed to such city by virtue of annexation without necessity of compensating the school township in which the buildings were situated, notwithstanding Acts 1917, c. 121, providing for appraisal of property in annexed territory, such statute having been repealed by implication by Acts 1919, c. 81, without a saving clause as to rights given under the former act.—*City of Jeffersonville v. Jeffersonville School Tp., Ind.*, 130 N. E. 879.

54.—**Negligence.**—Intoxication.—In viewing the conduct of one who has voluntarily become intoxicated, his drunkenness affords no excuse, and he will be judged as though he were in possession of his faculties and charged with his failure to avoid the consequences of another's negligence, which could have been done in the exercise of ordinary care.—*Fairburn & Atlanta Ry. & Electric Co. v. Latham, Ga.*, 107 S. E. 88.

55.—**Railroads.**—Amendment to Process.—In an action against the director general of railroads for an injury occurring prior to the federal operation of railroads, where the petition and process were served both on the director general and the railroad company, and the petition as amended alleged a cause of action against the company, a proposed amendment to the process striking the name of the director general and substituting the name of the company as defendant was improperly disallowed.—*Byrd v. Hines, Ga.*, 106 S. E. 925.

56.—**Federal Control.**—Under Federal Control Act, March 21, 1918, §§ 1, 8, 12, and Transportation Act 1920, §§ 202, 206, 211, the new director general, appointed pursuant to section 211 of the Transportation Act, is the proper party plaintiff in an action to recover a claim accruing to the United States or to the director general during the period of federal control.—*Hines v. Struthers Furnace Co., U. S. D. C.*, 271 Fed. 792.

57.—**Liability for Fire.**—Where property was fired by spark from a locomotive engine when the railroad was under federal control, the owner properly brought his action against the railroad company, despite Federal Control Act March 21, 1918, § 10, and General Order No. 50, issued by the federal director general of railroads.—*Beebe v. Minneapolis, St. P. & S. S. M. Ry. Co., Wis.*, 182 N. W. 743.

58.—**Limitation of Actions.**—Transportation Act 1920, § 206, par. F, providing that the period of federal control shall not be computed as part of the periods of limitation in actions against carriers for causes of action arising prior to federal control, excludes from such periods the period of federal control from December 31, 1917, to March 1, 1920, and is valid even as applied to a cause of action for personal injuries against a carrier, which was barred February 28, 1920, when the act was approved, as there is no constitutional prohibition forbidding the removal of the bar of limitations against causes of action based upon debts, claims, or personal demands, even though the bar has already attached when the act is passed, and the power of Congress to legislate upon this subject-matter rests on the same basis as its power to pass the other acts relating to federal control.—*Standley v. United States Railroad Administration, U. S. D. C.*, 271 Fed. 794.

59.—**Sales.**—Conditional Sale.—Where one to whom property was sold under a contract of conditional sale, duly attested and recorded, sold the property to claimant and absconded, without paying the price, the property was subject to attachment in an action for the purchase money, notwithstanding the sale to claimant.—*McCray v. Bledsoe & Holmes, Ga.*, 106 S. E. 920.

60.—**Warranty.**—Where threshing machine buyer notified local agent of defects, and where agent, pursuant to such notice, sent experts to remedy the defects, the buyer's failure to notify the home office of the defects, as required by the warranty, did not defeat recovery for breach of warranty, on the experts' failure to remedy defects, since the only purpose of such notice was to enable seller to remedy defects if possible.—*J. I. Case Threshing Mach. Co. v. Tate, Col.*, 197 Pac. 764.

61.—**Specific Performance.**—Option.—Where one having an option to purchase property permitted it to be sold to a third person before exercising its option, it had no equitable interest in the land which would support a suit for specific performance, but was limited to an action at law for breach of the contract.—*Trieschmann v. Blytheville Steam Laundry, Ark.*, 230 S. W. 3.

62.—**Taxation.**—Charitable Purposes.—A Young Men's Christian Association, incorporated to promote the moral, physical and educational welfare of young men, and supported in large part by voluntary contributions from the public, which in its practical work, as outlined in the opinion, actually carried out those purposes by a system of moral, physical, religious and educational training and influence for the betterment of its members and the general benefit of the community, is a charitable organization, and its building, in so far as it is actually and necessarily used for those purposes, is exempt from taxation under section 6301, Rev. St. 1913. In re Young Men's Christian Ass'n Assessment, Neb., 182 N. W. 593.

63.—**Notice.**—Where a board of county tax assessors makes changes or corrections in tax returns under section 1116 (k) of Park's Pol. Code, relating to the duties of such board, it is the duty of the board to give notice to the taxpayer of the change, either personally or by leaving same at his residence or place of business; and service by sending the notice through the mails is not compliance with the statute, except in case of non-residents of the county where the returns are made.—*Linder v. Watson, Ga.*, 107 S. E. 62.

64.—**Wills.**—"Children."—In a will giving the property to the children of testatrix, a provision that any amount allowed to any of the children on a claim for personal services to testatrix or any of the children should be deducted from the share of the claimant does not authorize the deduction of the amount allowed to the son-in-law for the support of an adopted child of testatrix to be deducted from the share of the daughter who was claimant's wife, since the word "children" cannot be extended by construction to include the husband of a child.—In re Vervoren's Will, Wis., 182 N. W. 731.

65.—**Witnesses.**—Privileged Statements.—Neither death nor divorce destroys the privilege that a spouse has under the rule of evidence that prohibits either one of them against the will of the other to lift the screen of privacy to public gaze and disclose statements made in private to each other in any conversation between them during their marriage relation.—*Wiggins v. Tiller, Tex.*, 230 S. W. 253.

66.—**Workmen's Compensation Act.**—Duty to Furnish Forms.—Workmen's Compensation Act, § 56, providing that the Industrial Board shall prepare and cause to be printed and on request furnish free of charge to any employer or employee such blank forms as it shall deem requisite to promote efficient administration of the act, does not impose on the Industrial Board the duty of mailing or transporting the forms which it is required to prepare and cause to be printed; "furnish" meaning to supply or provide.—*Wright v. Weil Bros. & Co., Ind.*, 130 N. E. 878.

Central Law Journal.

St. Louis, Mo., August 19, 1921.

IS A GOVERNOR PRIVILEGED BY HIS OFFICE FROM ARREST AND PROSECUTION IN CRIME?

The following comments are submitted on the reasons set forth by the attorneys of Governor Small for his alleged immunity from arrest and prosecution on a criminal charge while he holds the office of governor.

These reasons, in so far as they are based on the theory of the separation of powers, seem entirely groundless. It is true that the executive is free from judicial interference in the performance of his executive duties. The court will not attempt to invade the realm of his executive discretion "to enjoin him, to mandate him, or prohibit him."

But this does not show that when he steps aside from the sphere of his duty and violates the law, he is not amenable to the law and the courts the same as any other person. It is a fundamental principle of our system that all men are equal before the law. As Dicey says in his work, *The law of the Constitution*, (4th ed., p. 183), "We mean when we speak of the 'rule of law' not only that with us no man is above the law, but that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. With us, every official, from the prime minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Officials are liable to punishment or to the payment of damages, even for acts done in their official character in excess of their lawful authority. This is probably the case even with officers of the state militia, during a time of so-called "martial law."

One argument advanced is that if the sheriff tries to carry out the order of the court, the governor might, as commander-in-chief of the militia, resist arrest. As the Supreme Court of Wisconsin say, by Justice Marshall, in the case of *Ekern v. McGovern*, (142 N.W. 595, 46 L. R. A. (N. S.) 797, 816):

"Some courts have given the weak excuse for doubting their right to send a writ to a governor directly or indirectly questioning his executive act, that the court might be powerless to enforce obedience,—even suggesting the possibility of executive control of the militia having to be contended with; as if a court with knowledge of its constitutional authority would be justified, under any circumstances, in not using it merely because the one who would be otherwise acted upon, even though he be the chief conservator of the law, might commit treason, as it were, rather than submit to duly constituted authority. This court has never yet acknowledged the existence of either the want of power to enforce its writs, or want of courage to vindicate it." (See also *Atty-Gen. ex rel, Bashford v. Barstow*, 4 Wis. 742.)

The governor, then, as a violator of the law, stands no different than any individual who may be powerful enough to resist arrest. As commander of the militia, he has no lawful right to use the military force of the state to defy the officers of the law. The military would be in duty bound to disregard the illegal command of the governor if he should order them to use physical force against the sheriff.

As Willoughby says in his work on *Constitutional Law* (Vol. 2, chap. 54, p. 1062): "We have no chief executive who is exempt from responsibility to the law."

"No man in the country is so high that he is above the law. No officer of the law may set that law at defiance with impunity." (*U. S. v. Lee*, 106 U. S., 196, 205. See 205 U. S. 349, 353).

Justice Valentine said in *Martin v. Ingham*, (38 Kan. 641, 17 Pac. 162), "There is no express provision in the Constitutions nor in any statutes exempting any member of the executive department, chief or otherwise, from being sued in any of the courts, * * * and if any one of such officers is exempt, it must be because of some hidden or occult implications of the Constitution or the statutes, or from some inherent or insuperable barriers found in the structure of the government itself. It is said that if the governor opposes the order or judgment of the court, it cannot be enforced, * * * but are the courts to anticipate that the governor may not perform his duty?"

The whole question would seem to come down to this, should the courts hold, on grounds of public policy that they will not act coercively as to the governor except in case of extreme emergency? If so, the public policy which would protect the governor as a co-ordinate department of the government from being interfered with by judicial mandate, except in dire emergency, would not apply with full force to subordinates acting by his authority. (See *Ekern v. McGovern*, *supra*.) As the attorneys for Governor Small point out, it would be unfortunate if the chief executive were to be hampered in performing his public duties by arrest, prosecution, or imprisonment. A limited immunity from arrest is commonly granted to legislative officers during the legislative session.

"By the constitutions of most states, state senators and representatives are privileged from arrest in all cases except treason, felony and breach of peace, during the session of the legislature or in going to and returning from the legislature." (Constitution of Illinois, Article 4, sec. 14; *Stimson, Federal and State Constitutions*, sec. 273.)

"In most states, the constitution provides that electors shall be free from arrest while attending, going to and return-

ing from the polls, except for treason, felony, or breach of the peace." (See Constitution of Illinois, Article 7, sec. 3; *Stimson, Federal and State Constitutions*, sec. 237).

If there is any such privilege or immunity from arrest or prosecution in favor of the governor to protect him in the performance of his judicial duties it is a matter, the extent and occasions of which are to be decided by the courts or the legislature and not by the governor by a display of unlawful military force or resistance to the execution of the law which he has sworn to support.

The remedy of the governor, if he wishes to question the jurisdiction of the court, would be to submit to arrest and then by writ of habeas corpus, test out the legality of it under the circumstances.

If there is no power to arrest, it would seem that there is no power to proceed with the prosecution, as the presence of the accused for all stages of trial is absolutely necessary in criminal procedure.

HENRY W. BALLANTINE.

NOTES OF IMPORTANT DECISIONS

PROHIBITION AGAINST INDIAN OFFICIAL'S INTEREST IN TRADE WITH INDIANS NOT LIMITED TO PROPERTY IN WHICH GOVERNMENT HAS AN INTEREST.—The Indians have today, in many cases, become wealthy and are the objects of many designing individuals, including agents of the Bureau of Indian affairs. These agents in some cases have great influence with the Indians and in all cases have many opportunities to take advantage of their ignorance and inexperience.

Rev. Stat. 2078 provides that no person employed in the Indian Department shall have any interest in any trade with the Indians except on account of the United States. In the recent case of *United States v. Hutto*, 41 Sup. Ct. 541, the defendant, an Indian Agent, was charged with conspiracy to commit an offense against the United States in that he agreed with others to induce the Indians of a certain tribe to sell their land and buy automobiles upon which sales he, the said Hutto, was to have received a commission. Defendant de-

murred, and the District Court sustained the demurrer, on the ground that Section 2078 was inapplicable to transactions involving lands or other property with respect to which the Government has no interest or control. The Supreme Court with a magnificent reach of vision with respect to the duty of the American government toward the Indians, shows that Section 2078 was not intended to protect the Indians from the Government itself or its agents but to protect the Indian from all designs upon his credulity and to make the Indian Agent his disinterested adviser. The Court said:

"In this connection the provision of section 14, 'that no person employed in the Indian department shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States,' manifestly had a significance extending quite beyond any pecuniary interest of the United States in government trade or barter with the Indians. In its original setting, and more emphatically when grouped in the Revised Statutes with other provisions having to do with the supervision and management of the affairs of the Indians, it manifestly was and is designed to insure integrity of conduct on the part of all persons employed in Indian affairs, and an impartial attitude towards the Indians, by excluding from persons so employed all motives of personal gain, so that the duty of the United States as trustee for these dependent peoples, recognized wards of the government, might be performed with a single regard for their interests appropriate to the fiduciary relation. The purpose was to protect the Indians from their own improvidence; relieve them from temptations due to possible cupidity on the part of persons coming into contact with them as representatives of the United States; and thus to maintain the honor and credit of the United States, rather than to subserve its pecuniary interest."

SUCCESSORS OF INELIGIBLE NOMINEES.

The Problem.—Quite recently there has been some discussion as to whether Mr. Ford would become a member of the Senate, in case the United States Senate should deprive Senator Newberry of his seat. We have also the recent decision of a Minnesota judge, that since Rev. O. K. Kvale circulated false statements about Congressman Volstead, which were alleged to have been a cause of the former's success in the primaries, and as this violated the corrupt practices act, that Mr. Volstead be declared the

Republican nominee.¹ This decision was subsequently overruled by the Minnesota Supreme Court, which declared there was no Republican nominee. Mr. Volstead was then nominated by petition and elected.

This legal question arises: When a candidate is declared ineligible for the position to which he is elected or nominated, does the position or nomination automatically go to the eligible candidate having the next highest vote? This is, obviously, a different question from that involved where a fraudulent count of the vote is alleged.

The English Rule.—The English rule is that votes for an ineligible candidate are of no avail, and the eligible candidate receiving the next highest number of votes is declared elected.²

In the United States this rule is followed in Indiana alone.³ A slightly different case arose a few years ago in Wisconsin. Tucker, candidate for the Republican nomination for attorney general in the primaries of September 6, 1910, died September 1, 1910. The fact of his death was published generally in the newspapers throughout the state. But at the primaries he received 63,482 votes and Bancroft 58,156. By a four to three vote, the Supreme Court of Wisconsin decided⁴ that Bancroft was entitled to have his name placed on the final election

(1) Mr. Kvale had the endorsement of the Non-Partisan League. The present author has little sympathy with the aims, leaders, or methods of that organization. Nevertheless, he believes that the first Minnesota decision was in error. The Supreme Court of Minnesota showed a commendable degree of calmness and lack of partisan bias in overruling the lower court.

(2) Mechem on Public Offices, section 206.

(3) *Gullick v. New*, 14 Indiana 93 (1860). This is perhaps, slightly modified by the opinion in *State ex rel. Clawson v. Bell*, 169 Ind. 61, 82 N. E. 69 (1907).

(4) *Bancroft v. Frear*, 144 Wis. 79, 128 N. W. 1068 (1910). The court clearly stated, however, an adherence to the American rule. It emphasized the fact that voters knowingly voted for an ineligible candidate. The later Indiana cases take substantially the same ground, although not clearly abandoning the theory of the English rule. In the Wisconsin case, the Court said: "If the majority should contumaciously persist in voting for candidates notoriously ineligible, it might not be possible to fill the office at all."

ballot as the Republican candidate for attorney general.

The General American Rule.—"It is universally the rule that an election is void where its result has been produced by bribery."⁵ "An election may always be avoided by showing that its result has been produced by corrupt practices of, or in the interest of, the successful candidate."⁶ There is here no statement that the next highest eligible candidate will succeed to the vacancy—"No election" is declared.⁷ The next highest man is not elected, and a new election must be held.⁸

Congressional Precedents.—In the case of *Smith v. Brown*, 40th Congress, the committee on elections declared: "The committee are therefore of the opinion that the law of the British Parliament in this particular has never been adopted in this country and is wholly inapplicable to the system of government under which we live."

The Committee on Elections in the Utah contested election case of *Maxwell v. Campbell*, 43d Congress, took the ground in its report that if the member-elect is disqualified, the minority candidate is not thereby entitled to the seat.⁹

In the Indiana case of *Lowry v. White*, 50th Congress, the majority of the committee in its report, said: "The universal weight of authority in the United States and the numerous decisions in both branches of the Congress thereof, render an extended discussion on this point quite unnecessary. With the exception of the State of Indiana * * * there is perhaps not another state in

the Union where such a doctrine prevails," as the English rule proclaims.¹⁰

November 5, 1918, Berger received 17,920 votes, to 12,450 cast for Carney. The committee report submitted October 24, 1919, declared that Berger was ineligible and not entitled to the seat. "Your committee is of the opinion that Joseph C. Carney, the Democratic contestant, is not entitled to the seat."

Joseph C. Abbott of North Carolina, claimed a seat in the United States Senate, though he received only a minority of the votes, since he was the only eligible person voted for. It was declared that he was not elected.

In view of these decisions it is difficult to see how Mr. Ford could be given the seat now held by Mr. Newberry, if the United States Senate should declare the latter ineligible.

State Precedents.—With the exception of Indiana, the various states have not followed the British principle.

Who Can Contest?—A defeated candidate has the prima facie right to contest the election of his successful opponent, and may obtain a judgment that there has been no election, even though he cannot show his own right to the office.¹¹ A person claiming the office of county judge and stating good grounds for his claim was entitled to contest the right of one to hold such office who had violated the Corrupt Practice Act. This is so, even though he is not eligible himself, to the office involved.¹² A defeated candidate for the office of county clerk may contest the right of his successful competitor on the ground of ineligibility by reason of an insufficient term of residence in the county.¹³

(5) 10 A. and E. Encyclopedia of Law, p. 780, and cases cited.

(6) *Ibid.*, p. 791.

(7) *Mechem on Public Officers*, section 206 and cases cited. "The doctrine here supported by an undoubted preponderance of authority is that though the candidate receiving the highest number of votes may, because of his ineligibility, fail of election, yet the votes cast for him are so far effectual as to prevent the election of other candidates, and there is no election at all."

(8) *Throop on Public Officers*, section 163. *Dillon* (4th ed.) on *Municipal Corporations*, section 196.

(9) *I Hinds' Precedents*, 494, 495.

(10) *Ibid.*, 403.

(11) *Francis v. Sturgill*, 174 S. W. 753, 163 Ky. 650 (1915).

(12) *Diehl v. Totten*, 32 N. D. 131, 155 N. W. 74 (1915). Under compiled laws 1913, §§ 1046, 1048. See also: *McKinney v. Barker*, 180 Ky. 526, 203 S. W. 303 (1918). Under *Corrupt Practice Act*, § 11. *Hardin v. Horn*, 184 Ky. 548, 212 S. W. 573 (1919).

(13) *Grinstead v. Scott*, 82 Ky. 88 (1884).

To succeed to the office or nomination, however, a contestant must show title in himself.¹⁴ To be capable of taking office, he must receive a majority or plurality of the votes cast.¹⁵ That a candidate who received a majority of the votes cast at an election died before the polls closed, does not give the only surviving candidate the right to the office, since he did not get a majority. The votes for the deceased were cast in good faith and must be counted.¹⁶

The Principle Involved.—We always desire to know more than simply the decisions uttered by the courts. What underlying principles are involved? Why, for instance, did the House Committee on Elections declare that the British rule "is wholly inapplicable to the system of government under which we live"? To many persons the English practice of absolutely disregarding ballots cast for ineligible candidates seems entirely proper.

"A majority, or at least a plurality, shall be required to elect a person to office by popular vote," and where the successful candidate is ineligible, "it is enough in such a case to hold the election void."¹⁷

That a candidate getting the most votes is ineligible does not give the office to the next highest.¹⁸ "An election is the deliberate choice of a majority or plurality of the electoral body. * * * The votes are not less legal votes because given to a person in whose behalf they cannot be counted. It is fairer, more just, and more consistent

with the theory of our institutions to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject."

"It has several times been held, where a majority of the electors vote for an ineligible candidate, that the election is a nullity, although eligible candidates may also have been voted for. The person receiving the highest number of votes in such a case is not elected because of his ineligibility, and no other candidate can be considered as elected, because a majority of the electors have expressed their will and determination that he should not be elected."¹⁹

A Kentucky law provided that if any candidate violates any of the provisions of the Corrupt Practices Act, in a contest over the election, "said nomination or election shall be declared void," and the candidate receiving the next highest number of votes, and who has complied with the provisions of the act, shall be declared elected or nominated.²⁰ The Supreme Court of Kentucky declared that this provision was unconstitutional. All of the courts everywhere "deny the right of election to any candidate receiving a less number of votes than a majority or plurality when his opponent receiving such majority or plurality was ineligible for the office or died before the election was over."

The court further said:

"No one can be declared elected and no measure can be declared carried, unless he or it receives a majority or a plurality of the legal votes cast in the election. Votes cast for an ineligible candidate must be counted and they constitute a part of the total votes cast in the election."

(14) *Coghlan v. Alpers*, 140 Cal. 648, 74 Pac. 145 (1903); *Francis v. Sturgill*, 163 Ky. 650, 174 S. W. 753 (1915).

(15) *Georgia v. Swearingen*, 12 Ga. 23 (1852); *Sublett v. Bidwell*, 47 Mississippi 266, 12 Am. Rep. 338 (1872); *McKinney v. Barker*, 180 Ky. 526, 203 S. W. 303 (1918).

(16) *Howes v. Perry*, 92 Ky. 260, 17 S. W. 575 (1891). Also *State v. Speidel*, 62 Ohio St. 156, 56 N. E. 871 (1900). In both these cases the successful candidate died on election day, thus distinguishing this from the Wisconsin case of *Bancroft v. Frear*, before cited.

(17) *McCrary on Elections*, section 330.

(18) *Saunders v. Haynes*, 13 Cal. 145 (1859). The opinion in this case fairly expresses the American view. See also *Cooley, Constitutional Limitations*, 4th ed., p. 781.

(19) *Wood v. Bartling, Mayor*, 16 Kan. 109 (1876). See also *State ex rel. Off v. Smith*, 14 Wis. 497 (1861).

(20) One provision was that candidates should file pre-election statements. This was not done in the instant case, *McKinney v. Barker*, 180 Ky. 526, 203 S. W. 303 (1918). See the cases cited in the decision. And see *Hardin v. Horn*, 184 Ky. 548, 212 S. W. 573 (1919), which declared the same provision void.

This argument was well presented by the Mississippi Court:²¹

"Although the majority vote for a disqualified person, the votes so cast are not illegal, and therefore, to be treated as naught, but the result is, if the ineligible candidate cannot take the office, the electors have failed to make a choice."

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New York City.

(21) *Sublett v. Bidwell*, 47 Mississippi 266, 12 Am. Rep. 338 (1872). See also: *State ex rel. Atty. Gen. v. Vail*, 53 Mo. 97 (1873); *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082 (1904). The opposite rule, as stated before, prevails in Indiana. Thus, in *Gullick v. New*, 14 Ind. 93 (1860), the court declared: "While it is true that the votes of a majority should rule, the tenable ground appears to be that if the majority should vote for one wholly incapable of taking the office, having notice of such incapacity, or should perversely refuse, or negligently fail, to express their choice, those, although a minority, who should legitimately choose one eligible to the position, should be heeded." In a later case, *Copeland v. State*, 126 Ind. 51, 25 N. E. 866 (1890), the Court said: "It has been repeatedly held by this Court that votes cast for a person not eligible to an office cannot be counted against the opposing candidate, who is eligible." For other Indiana cases, see citations by Court in *State ex rel. Clawson v. Bell*, 163 Ind. 61, 82 N. E. 69 (1907).

PSYCHO-ANALYSIS IN THE COURTS.

In the recent criminal appeal of *Rex v. Quarmsby Times*, 22nd inst.), where a murderer convicted at Blackpool Assizes appealed against his conviction on the ground of misdirection as to the facts by Mr. Justice Acton, the court dismissed the appeal in view of the fact that the learned judge had correctly stated the rule of law on "insanity" as laid down eighty years ago in the *locus classicus*, *Macnaghtens' Case* (1843, 10 Cl. & F. 200). But Mr. Justice Darling, in delivering the judgment of the court, pointed out one great difficulty under which learned judges labor, in dealing with a plea of "impulsive insanity," and in commenting on the evidence of medical experts, namely, their complete ignorance of the modern scientific and medical aspects of what is known in present-day philosophy as the "New Psychology,"

popularly but not accurately called, "Psycho-analysis." This, no doubt, does constitute a grave difficulty, and we fear may lead to miscarriages of justice.

Incidentally, it may be pointed out that the education of barristers, from whose ranks all judges are selected, is not well fitted to prepare the future counsel or judge for dealing with many phenomena of modern life. An English barrister, beyond a very perfunctory examination in general knowledge, from which he is excused if he has matriculated at any British university, is not required to study anything but jurisprudence in its various forms. The result is that the English Bar, as a body, is not well-informed on many matters with which foreign and American lawyers are expected to be familiar, *c. g.*, Economics, Psychology, and even the Principles of Logic. With the Scots Bar it is different. The examination of a Scots advocate includes in its general subjects both moral and mental philosophy, which in the Scots universities, until recently, meant that under the heading of moral philosophy, economics and ethics were studied, while mental philosophy included psychology and logic. Again, in his professional legal examination there is included, "Medical Jurisprudence," which is a comprehensive subject covering a number of topics from Toxicology to Mental Pathology. The result is that Scots advocates and judges are better equipped for dealing with many classes of cases, especially the technical aspects of poison-trials and insanity pleas, than are their less thoroughly educated English brethren. If and when the new University of Law, so often talked about, is created, we hope that some effort will be made to improve the somewhat antiquated methods of legal education still in vogue in the Inns of Court.

And here we should like to make another suggestion. We borrow the idea from the new Army School of Military

Administration at Chisleton Camp. To that School of Instruction every commanding officer has on appointment to go for a three months' course in Economics and other subjects which assist in the administration of a military unit. And in the future, we believe, such officers will be expected at intervals of a few years to undergo "Reviver" courses in the same subjects. Now, we do not suggest for a moment that judges or barristers should be expected to go through "Instructional" or "Reviver" courses of law and subjects ancillary to law. But it does seem to us quite feasible and highly desirable that justices and their clerks should be given facilities for the acquisition of essential legal principles by attending short courses of instruction at the Law Courts, or the Law Society, or the Inns of Court. We believe that the more enlightened justices would eagerly welcome such opportunities. In fact, women justices are apparently organizing something of the sort for their own especial benefit. In any such course, we think, the "New Psychology" in its forensic aspects might well be included as one of the subjects in the curriculum. Perhaps, even, some learned judges of the High Court would not despise an opportunity of attending such a course of lectures in the capacity of honored guests.

Now, there are quite a number of different ways in which the "New Psychology" is of utmost importance in the administration of the law. One of these relates to Evidence; another concerns the pathology of the insane; and a third affects certain forms of crime committed chiefly by juveniles and by women of respectable character. The first of the matters just enumerated is probably the one in which Psycho-analysis will ultimately have most to teach us. It must be admitted that at present our English methods of sifting evidence in court are in the highest degree unsatisfactory. A

witness is placed in the box. There he or she is subjected to a series of questions at the hands of cross-examining counsel with the object of shaking the evidence given in examination-in-chief. The jury are told to "watch the demeanour of the witness" and decide therefrom whether or not such witness is or is not "a witness of truth." To men of science all this is highly unsatisfactory.

To begin with, neither judge nor jury have any specialized training in "watching the demeanor" of witnesses. They do not know the scientific principles which the new school of Psychology has been slowly elaborating as a means of judging such demeanor. In fact, their judgment of demeanor is superficial in the extreme. A cool witness is generally believed. Yet the psychologist well knows that "coolness" is a mark of the skillful liar and also of the recklessly imaginative person. A woman of hysterical type will tell a false story in the box with the utmost coolness of demeanor and be consistent even in the most meticulous details. An honest woman will hesitate, admit on pressure that she may be mistaken, and, generally, tell a halting story. Again, policemen who have concocted their testimony at the police station will roll it off without turning a hair; in fact, a lying policeman—who unfortunately is not a mere myth—is well-known to Old Bailey counsel as the most dangerous of all lying witnesses; "he knows the ropes," and so is careful to avoid inconsistencies or improbabilities. Nervous and confused witnesses are always disbelieved; yet the man of science knows that they are often the most truthful. Neither judges nor juries seem as yet to have much grasp of the criteria by which truth is to be distinguished from falsehood. Nor can counsel assist them much, for counsel are themselves ignorant. The whole machinery and technique of cross-examination is quite out of date.

Now, as a matter of fact, psychologists in France and America have built up a system by which it is possible to detect "truth" from "falsity" with some degree of scientific exactitude and certainty. Various devices enter into this method. One consists in ascertaining the "tempo" of the witness, *i. e.*, the normal rate at which his mind works in answering a question. Some minds work almost instantaneously; the question "Did A happen to B" calls up at once the symbolic reaction which we call a "judgment" in the form of a reply "No, A did not happen to B." With other minds a few seconds normally elapse. With others, again, almost a half-a-minute. Now the experienced psycho-analyst begins by putting a few purely formal questions to his subject, just like the opening questions in examination-in-chief, such as "Your name," "Your address," "Your occupation," and the like. From these he calculates the normal "tempo" of the witness, *i. e.*, the rate of his mental reaction to an idea presented to him. Of course, this rate varies with the character and recency of the event so presented; but for this allowance is made. So, when cross-examination is reached, the analyst quickly finds out two things; in some cases the subject answers the question in his proper time-limit, but in other cases he takes much longer. Experience shows that, subject to certain qualifications due to peculiar causes which we cannot discuss in detail, in the former case the witness is giving a straightforward, candid answer; in the latter case he is giving a concocted answer in order to evade candor. This is a far better test of candor than any observation of demeanor.

Now, when an experienced psycho-analyst finds that his subject is giving calculated, not candid, replies to certain questions, he at once proceeds to discover the reason. It does *not* follow that the witness is trying to conceal the truth. That is only one possible explanation.

Another is that the witness finds something disagreeable in an idea called up by the question; his mind tries to repress this suggestion of disagreeableness; and the effort to protect himself against it takes up time. For example, a boy is asked: "Did you cross the orchard on your way to school?" He takes fifteen seconds to reply, "Yes, I did," whereas his "tempo" is only five seconds per reply. It does not follow in the least that he is lying. The explanation may be that he once stole some apples from a tree and was severely punished in consequence; his mind tries to "repress" the disagreeable memory of the punishment by shutting out the idea of an orchard or an apple altogether. The result is that, when his attention is directed to either, he has first of all to overcome the disagreeable association by an effort before he can think out the question and give a reply. It is necessary, therefore, to discover whether or not the breach of "tempo" is due to deliberate evasion or to the "protective instinct" of the mind which endeavors to repel an unpleasant idea.

Again, still another reason may account for our schoolboy's failure to reply in due time. He may have a "complex," that is to say, a group of ideas in his mind which is unlocked by the idea contained in the question. For example, our schoolboy may have a strong natural bent towards a life of farming in the colonies, but his parents may have decided to place him in a city office and have tried to repress his natural inclination for a life of colonial adventure. The result of their effort to repress may well be that the idea is driven underground: he never thinks of it deliberately and consciously, but rather strives to forget it and fall in with his parents' wishes; the result is that the idea takes up a large part of his "subconscious" mentality, and is always coming to the surface whenever his will is unable to act and repress it. It emerges in sleep, when the reason has

no control over one's dreams, in moments of day-dreaminess when the mind is empty, and in moments of sudden shock, *e. g.*, a street collision, when the will is off its guard. The group of ideas connected with farm-life in the colonies becomes a "complex," which may easily be unlocked by suggestion. The putting of a question relating to an orchard, in the solemn and exciting experience of testimony in the witness-box, acts as such a key to unlock the "complex," but the unlocking takes time, and the boy has to resist the "complex" before he can apply his mind to the question put him. Hence the abnormal slowness of his "tempo." The trained psycho-analyst has to discover whether this may not be the explanation of the abnormality of tempo; and he has now elaborated a machinery for doing this.

We have given a very simple illustration to explain the methods of the experienced psychologist in dealing with a subject. The system of cross-examination in such investigations is really very elaborate; but we cannot go into details. It is enough to say that, as the result of the system properly applied by a competent investigator, it is usually not a very difficult matter to ascertain—

(1) when a witness is deliberately lying;

(2) when he is merely disturbed by a disagreeable memory and is obstructed by the necessity of repelling it;

(3) when he has a "complex" upon which the question has accidentally or deliberately impinged by his interrogatories.

Once the analyst has obtained a clear grasp of his subject's mentality, as he can generally do in the course of a few hours' conversation, he acquires an astounding capacity to tell when the subject is lying or of what hidden matters he is thinking at the moment. Only those who have had some practical experience of psycho-analysis as conducted by trained

psychologists, not by the charlatans who abound at every street corner, can have any conception of the facility with which even subtle minds can be read as the result of a skillfully-conducted examination.

Here we must pause. To go into the details of this fascinating subject is outside our limits of space. The importance of psycho-analysis in connection with the testing of evidence, however, will be clear to anyone who has followed these observations of ours. Its utility in the investigation of insanity or the probing of the motives for crime is, perhaps, more doubtful. At any rate, in these spheres much less certainty has been attained, and much less advance has been made. But, for purposes of cross-examination, psycho-analysis has now been placed on a scientific foundation which renders it of the utmost possible service to all engaged in the investigation of crime. The advocate in criminal courts and the detectives of the C. I. D. branch of Scotland Yard would be well advised to add this new method to the number of their technical studies. Indeed, fifty years hence, it is probable that every advocate in the courts will find it necessary to study and practise the principles of the New Psychology almost as a matter of course.—*Solicitors' Journal* (London).

MASTER AND SERVANT—RIGHT TO INVENTIONS.

WIRELESS SPECIALTY APPARATUS CO. v. MICA CONDENSER CO.

Supreme Judicial Court of Massachusetts. Suffolk. June 3, 1921.

131 N. E. 307.

Where employees were employed solely for experimental work to develop a method of manufacturing magneto condensers, and were aided and furnished information by the employer's superintendent, and understood, or ought to have understood, that the employer intended to keep the processes secret, and that any information received by them was confidential, a relation

of trust and confidence existed which estopped the employees from claiming as their own property inventions made in the course of such experimental work, though there was no express agreement or understanding that inventions were to be the employer's property.

JENNEY, J. The Wireless Specialty Apparatus Company is the plaintiff in two suits, both relating to the same subject-matter and tried together. During the Great War the plaintiff made radio condensers for the United States government. On the signing of the armistice, it became apparent that this industry would be seriously affected, if not ended, and the plaintiff's officers conceived the idea of producing magneto condensers to be sold to manufacturers of electrical apparatus. By June, 1919, the six employees then remaining in the plaintiff's condenser department were employed in experimental work in developing a method of manufacturing such condensers. This work was continued until about October, 1919, when the production of the condensers began. The work was substantially all performed in the plaintiff's shop, with its tools, at its expense, and under the general direction and supervision of one Priess, its chief engineer. Some examination had been made by the chief engineer, and by other persons, of the methods in use to accomplish the desired result. The judge found that, in course of the experimentation, "in at least three respects, important changes, improvements, or inventions * * * (had) been made," which "combined with others of minor importance * * * constitute a change, improvement or invention in the * * * general process" of manufacture of magneto condensers. It is noticeable that the findings characterized the result of this experimental work as "changes, improvements or inventions," but they also are declared to be "substantial and valuable, tending to reduce the cost of production and to improve the quality of the product." Later they are several times expressly described by the judge as inventions; applications were made by the defendant McPherson for the issuance of letters patent upon these inventions, which applications have been assigned by him to Watson Brothers, Inc., and by it to the Mica Condenser Company, Ltd., who are defendants in both suits. The plaintiff in one suit seeks to compel the assignment to it of said applications and of the inventions covered thereby; and in the other to enjoin their publication, manufacture or use by the corporations who are defendants in the first suit and by certain former employees of the plaintiff, on the ground that the inventions constitute secret processes of which the plaintiff was the owner. In the

second suit other relief of a kindred nature also is sought.

We consider the findings of the judge on the basis that they determine that the changes and improvements were in fact inventions which must be considered as patentable. The parties have so treated them.

These inventions as found and described by the judge are as follows:

"(1) In the machine for applying varnish to the sheets of mica used in the condenser, and by the use of copal varnish in the process; (2) the method of using so-called telltale light for detecting defects while building up the condenser stacks; (3) the process of rehealing a defective condenser without dismembering the same. These changes, improvements or inventions combined with others of minor importance may be fairly said to constitute a change, improvement or invention in the (4) general process."

The three inventions first named were in the main those of the defendant McPherson—who was one of the six employees of the plaintiff hereinbefore referred to—"qualified only by the statement that the use of copal varnish was the suggestion of Goodwin," a defendant in the second suit. The general process invention was the joint production of McPherson, Goodwin and Priess. The latter is still in the employ of the plaintiff. It is found on conflicting evidence that there was no express contract that any invention made by these employees was to be the plaintiff's property; and the evidence did not satisfy the judge that there was any understanding to that effect.

The principles governing relationship between employer and employee, so far as property in invention is involved—using that word in the sense in which it is used in the statutes relating to patents—are well established. An invention made by an employee, in the course of his employment and at his employer's expense, is the property of the inventor unless he has by the terms of his employment, or otherwise, agreed to transfer to his employer its ownership as distinguished from its use. It matters not how valuable the invention or how vital its control may be for the success of the business in which it has been conceived. *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 84 N. E. 133, 126 Am. St. Rep. 409; *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913B, 509; *Hapgood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369; *Dalzell v. Dueben Manuf. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172; *Dempsey v. Dphson*, 174

Pa. 122, 34 Atl. 459, 32 L. R. A. 761, 52 Am. St. Rep. 816.

However, as was said in *Solomons v. United States*, 137 U. S. 342, at 346, 11 Sup. Ct. 88, at 89, 34 L. Ed. 667:

"If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer."

The inventions here in controversy were made while the inventors were wholly engaged in "experimental work to develop a method of manufacturing magneto condensers." That for the time being was their sole employment. They were under the direction of the plaintiff's superintendent who aided and furnished information to them.

"* * * The persons concerned understood or ought to have understood that the plaintiff intended to keep the processes secret, and that any information received by them in the course of their employment was confidential information."

To justify a claim of property in the inventions, it must be held that the plaintiff had no interest in that which its workmen created while engaged in this special work, except the ownership of the actual things produced considered merely as chattels, and except a non-exclusive right to use them or the processes discovered. Such a result defeats the purpose in which they were engaged. In a case like this the nature of the employment impresses on the employee such a relationship of trust and confidence as estops him from claiming as his own property that which he has brought into being solely for the benefit and at the express procurement of his employer. The want of an express agreement that the ownership shall be in the employer is not fatal under such circumstances. This result is supported by authority. *Gill v. United States*, 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480; *Silver Spring Bleaching & Dyeing Co. v. Woolworth*, 16 R. I. 729, 19 Atl. 528. Said the court in *Gill v. United States*, supra, 160 U. S. at page 436, 16 Sup. Ct. at page 326, 40 L. Ed. 480:

"There is no doubt whatever of the proposition laid down in *Solomons' Case*, that the mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor, as his individual property, and that in such case the government would have no more right to seize upon and appropriate such property, than any other proprietor would have. On the other

hand, it is equally clear that, if the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do."

See, also, *McAleer v. United States*, 150 U. S. 424, 430, 14 Sup. Ct. 160, 37 L. Ed. 1130; *Dowse v. Federal Rubber Co.* (D. C.), 254 Fed. 308; *Ingle v. Landis Tool Co.* (D. C.), 262 Fed. 150; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 297, 78 Atl. 698; *Portland Iron Works v. Willett*, 49 Or. 245, 89 Pac. 421, 90 Pac. 1000. The question was expressly left open in *American Circular Loom Co. v. Wilson*, supra. The opinion states (198 Mass. 202, 84 N. E. 135, 126 Am. St. Rep. 409):

"How far the rule will be held to be applicable where it appears that by the express terms of the hiring the employee was to exercise his inventive faculties with reference to the specific inventions in question for the sole benefit of his employer, we need not now consider, for that question does not arise in this case."

So in *American Stay Co. v. Delaney*, supra, 211 Mass. at page 232, 97 N. E. 912, Ann. Cas. 1913B, 509, it was noted that the defendant was not "employed to originate inventions for the plaintiff's benefit."

The finding that there was no understanding as to future inventions does not prevent us from giving the relief to which the plaintiff is entitled on the facts found. It does not negative them or weaken their effect. A careful examination of the evidence—reported by commissioners—convincing us that no such construction can be maintained.

Goodwin, Barkley, Arthur Watson and Elbridge Watson, who are defendants in the second suit, while *Goodwin* was still in the plaintiff's service formed the plan of engaging in the manufacture of magneto condensers to compete with the plaintiff "to take advantage of the secret processes and machines which had been developed, and of the confidential information *Goodwin* had of the plaintiff's costs of production and other details of its business, so as to start the manufacture and sale of such condensers immediately."

Although the invention was first assigned to *Watson Brothers, Inc.*, it appears that the *Mica Condenser Company, Ltd.*, was shortly thereafter organized by *Goodwin, Barkley* and the *Watsons*, who were its only stockholders. While no express finding is made as to whether these corporations took with notice of the facts upon which the plaintiff's rights depended, it is apparent that they did so take. The *Mica Condenser Company, Ltd.*, does not argue that it

has any greater rights in or to the inventions than that which McPherson had against the plaintiff.

Although the first suit is decided on the basis that the plaintiff is entitled to relief because it is the equitable owner of the inventions already considered, it does not follow that it can get nothing under the second bill. It may be that no patent will issue because of lack of novelty or other reason and that the plaintiff will, in fact, receive nothing of value under any decree entered in the first suit. The fact that an invention is patentable does not compel the taking out of a patent, nor prevent the person entitled to it from keeping it secret, nor bar him from equitable relief against those disclosing its existence and details in violation of trust and confidence, nor as against those who obtain knowledge through such violation with notice and purpose to make use thereof. *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *American Stay Co. v. Delaney*, supra; *Aronson v. Orlov*, supra; *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Macbeth-Evans Glass Co. v. Schnelbach*, 239 Pa. 76, 86 Atl. 688. The fundamental requirement for relief is a violation of trust and confidence. Any one who gets the knowledge honestly can use it provided he is not restrained by the relationship under which he acquired it. *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442.

The defendants, Barkley, Elbridge Watson, Charles E. Watson and Goodwin, as found by the judge, "formed the plan * * * to take advantage of the secret processes and machines which had been developed (as hereinbefore stated) and of the confidential information that Goodwin had of the plaintiff's costs of production and other details of its business." Inasmuch as the allegations as to the wrongful taking and disclosure by Goodwin of plans, records, and other tangible property of the plaintiff have not been proved, the plaintiff is not entitled to relief as to such property; but it is entitled to injunctive relief as against these defendants and as against the Mica Condenser Company, Ltd., of which they are the only stockholders and which—the findings inferentially but clearly show—has acted with notice to its officers and agents. *Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000.

The question of damages, for which the defendants are liable, has not been tried.

In the first suit a decree with costs to the plaintiff is to be entered, ordering the Mica Condenser Company, Ltd., to assign to the plaintiff the inventions and applications for patents

hereinbefore considered and enjoining it from assigning or otherwise disposing of such inventions, and enjoining both defendants from using said inventions or any of them. If it is deemed advisable—in order to describe and identify said inventions so that a definite decree may be entered—the first suit may be further heard for that purpose.

So ordered.

NOTE.—Right of Employee to His Invention.—This question is quite fully treated in a note appended to the case of *Barber v. National Carbon Company*, 5 L. R. A. (N. S.) 1154, where the rule is laid down (on page 1177) that an employer is entitled to the benefit of all the discoveries of his employee which have a direct and immediate connection with the work which the latter was engaged to perform, and were made during that part of the day which he was bound to devote to the discharge of his contractual duties. The right of the employer in this regard is especially clear, where it is shown not only that the discovery in question was made during the working hours of the employee, but that the employer's material and machinery were being used under the employer's direction for the avowed purpose of making such a discovery.

On the other hand, the rule is laid down and supported by numerous authorities that if the employee makes an invention wholly independent of the employer, it is the law that the invention belongs to him, and that it does not inure to the benefit of the employer.

In a recent case it is stated that the fact that a patentee, at the time he made the invention, was employed by a manufacturing company as a draftsman, but under no contract to use his inventive faculties for the benefit of the employer, did not vest the employer with the entire property right of the invention and the patent monopoly thereof, or with anything more than a shop right to use the invention. *Ingle v. Landis Tool Company*, 272 Fed. 464. "This vexed question was the subject of litigation in this circuit, and its principles were discussed and determined by this court in *Pressed Steel Car Company v. Hansen*, 137 Fed. 403, 2 L. R. A. (N. S.) 1172, where, in affirming the decision of the lower court, this court held that, in the absence of an express contract of agreement to invent, the relation of employer and employee does not vest the employer with the entire property right of an invention of the employee and to the patent monopoly thereof, or to anything more than a shop right to use such invention. This decision was predicated on the earlier holdings of the supreme court of the United States, in *Dalzell v. Dueber Manufacturing Company*, 149 U. S. 315."

Where one was employed by a motion picture corporation to improve the light in the studio in every way possible and to use his expert knowledge and ability in that direction, and the general idea of an invention designated a "light dissolve" was that of the manager of the corporation, the latter was entitled to the invention. *Famous Players-Lasky Corp. v. Ewing*, Cal. App. 194 Pac. 65.

ITEMS OF PROFESSIONAL INTEREST.

SIR JOHN SIMON, ENGLAND'S REPRESENTATIVE AT THE MEETING OF THE AMERICAN BAR ASSOCIATION.

Each year in the fall, Great Britain sends across the Atlantic one of the most eminent of her jurists to represent her at the annual meeting of the Canadian and American Bar Associations. Last year it was Viscount Cave, Lord Justice of Appeal. Among his predecessors have been the former Sir Frederick Smith, then attorney general and now occupying the woolsack as lord high chancellor, with the title of Viscount Birkenhead. Then there has been Lord Finlay and the Earl Haldane, who was lord high chancellor at the time of his visit, but who left at home the great seal of the realm, of which he was ex-officio the keeper.

The British representative at the Bar Association in August, 1921, will be the Rt. Hon. Sir John Simon, who is on record as having on two occasions declined the offer of the woolsack, with its salary of \$50,000 a year, plus allowances, and a stately official residence in the palace of Westminster, but who has been in turn secretary of state for the home department—that is to say, for the interior—solicitor general and attorney general, with a seat in the cabinet.

Still well on the sunny side of 50, possessed of a most melodious voice, a master of eloquent oratory, enjoying an enormous practice at the bar, rivaling, if not surpassing, that boasted of by the new-fledged Lord Justice of Appeal (Edward) Carson, he was in strong running at one time for the liberal premiership. It was generally understood that he was Herbert Asquith's own choice as his successor in the premiership.

But Sir John happens to be burdened with a conscience, which is a terrible handicap to political success, and finding himself unable to subscribe to the conditions of the coalition or to follow Lloyd George when the latter became premier, he retired from office to resume his practice, which has been estimated by experts as over, rather than under, \$250,000 a year, fees of \$60,000 and \$70,000 being the rule rather than the exception.

Suddenly in 1917, he felt that being still comparatively young and in excellent health, his duty as a citizen lay at the front in France rather than in the courts of law or in the house of commons, so he gave up for the time being his practice, secured a commission as

lieutenant-colonel on the staff and joined the headquarters of Field Marshal Lord Haig. It was at a moment when the great war had entered into its most discouraging phase for the entente and when things were looking at their blackest. It was patriotism of the most unselfish kind that prompted him to take this step and to do his bit to the best of his ability at the front in France.

He quickly became most useful to the British commander-in-chief, and it was to him that the field marshal constantly turned for advice in the many questions of international law and the laws of civilized warfare that were constantly cropping up, among them the intricate problem of reprisals and the estimate of the extent and character of Germany's guilt in her indefensible and barbarous methods of warfare. Sir John worked quietly and unobtrusively, and won the sincere gratitude and high regard of Lord Haig, who cannot speak sufficiently highly of the assistance which he received at Sir John's hands.

If there is one defect that can be imputed to Sir John besides the burden of a terribly tender conscience, it is his lack of humor. But perhaps this is attributable to the fact that he is the son of a nonconformist minister in very straitened circumstances. In fact, it was only through his remarkable cleverness at school, where he won all sorts of scholarships, that he was enabled to secure a university education at Oxford as a student at Wadham college. There he carried off everything before him in the way of well-paid fellowships that furnished him with the wherewithal needed to study for the bar.

Coming to London with the kudos of having held the presidency of the Oxford union—that celebrated nursery of political eloquence and of leadership in parliamentary debate—Sir John, without any influence or backing, quickly acquired for himself such a name at the bar that when barely 30 he was chosen by the government as one of the British counsel in the Alaska boundary arbitration. At 3 and 30 he entered parliament, at 37 he was solicitor general and when 40 was flourishing as attorney general, with a seat in the cabinet and official emoluments, which in salary and fees amounted to \$80,000 a year, quite independently of his private practice.

Today Sir John Simon, who bears a striking resemblance to Lord Curzon, is devoted to motoring and to yachting and loves his life in the country. He has become through purchase the lord of the manor of Fritwell, one of the prettiest places in Oxfordshire. The man-

or house is a perfect example of Elizabethan architecture, the estate itself having been granted by William the Conqueror to Archbishop Odo soon after the battle of Hastings and figuring as belonging to that prelate in the pages of Domesday Book.—MARQUISE DE FONTENOY in *The Washington Post*.

BOOK REVIEWS

REED & WASHBURN'S BLUE SKY LAWS.

"Blue sky" laws, so called, have been enacted in thirty-seven states. Their purpose is to protect investors in the sale of promotion stock and other securities. They apply to the issuance of such securities, and usually provide for an examination by some state department of the validity of the claims made by the promoters of the new securities, and make invalid any sales thereof or impose a penalty upon those making such sales, until such securities have been passed by the blue sky department.

The great variety of the provisions of these laws makes it incumbent on stock brokers and promoters to be very careful before putting a new issue of securities on the market. A compliance with the laws of one state is not sufficient unless the sale is to be confined to persons in such state. If the appeal is to cover several states or the entire country, the proposition must be so set as to comply with the law of each state where sales are to be sought.

For the reasons just given, lawyers representing clients who desire to put on the market a block of new securities will welcome the new compilation of the blue sky laws of this country, by Robert R. Reed and Lester H. Washburn of the New York bar.

The work is divided into two parts. First, a general discussion of the history, purpose and construction of blue sky laws; and second, a compilation of the laws themselves according to states. In the first part there is also a discussion of the penal and civil liabilities attached to a violation of such laws and a discussion of the decisions so far rendered by the courts construing their various provisions.

The second part gives a very valuable summary of the general provisions of the law of each state as well as the full text of the act itself. This enables the busy practitioner to get what information he needs quickly and without unnecessary waste of time and effort.

Printed in 440 pages and bound in black cloth.

HUMOR OF THE LAW.

The Patron: Lookahere, I paid an amusement tax of 10 per cent of the price of my seat.

The Box Office Man: Well?

The Patron: Hand it back. I was not amused.—*Washington Star*.

Frank Pfleging, signal engineer, on a recent trip over the line was taken quite ill with grip and tonsillitis. Finding himself unable to proceed with caution to the next block, he tied up in a warm hotel room.

The M. D. came. He was an agreeable chap. After spending some time making a careful diagnosis he shook his head gravely and said:

"It's a bad case—a very bad case. You sent for me just in time." Then his face brightened. "But I will send you something that will put you on your feet by morning." He smiled mysteriously. "It never fails."

Visions of the good, old-fashioned remedy that made grandpa the man he was—the kind that comes in half-pint sizes—flitted across the patient's mental vision. "Why not?" he said to himself; "it has kept many a good man out of the clutches of the undertaker." Cheerfulness returned. "How much do I owe you, Doctor?" he asked.

"Five dollars," replied the M. D., then he added hastily, "but that includes the cost of the—er—remedy."

Frank paid it with great cheerfulness, then lay down to await the coming of the life saver.

It came. The patient's hands shook with eagerness as he untied the package. At last! Off came the paper, and then—

Aspirin, cascara and quinine!
(Quick curtain.)

This letter was received by a District Court Judge from one who was required to serve on petit jury:

The Honorable Judge:

Henry —, who is ordered to appear at — Court, first Tuesday of the month of February for jury selection, begs your Honor's excuse for following cause or causes:

New arrival of baby.

Mother confined.

Five children to be sent to school.

Five more smaller children at home.

There is cattle, sheep, horses, chickens, all looking for Henry to be taken care of.

Henry also has to see to wood and keep the fires going.

These are only a few of Henry's excuses.

—*The Docket*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Animals—Liability for Injury by Dog.**—In an action for injuries from the bite of a dog, an instruction requiring the jury, in order to find for plaintiff, to find that the dog was of a mischievous and vicious disposition and accustomed to bite persons, and that defendant knew or by the exercise of ordinary care could have known of such fact, and with such knowledge permitted the dog to run at large, and that while so running at large it became afflicted with rabies and attacked plaintiff, held proper where there was evidence of such facts.—*Rolleg v. Lofton, Mo.*, 230 S. W. 330.

2. **Assault and Battery—Assault on Teacher.**—A pupil, making a common assault on his teacher, and his father, who told him to commit such assault, were both guilty as principals; the offense being a misdemeanor.—*State v. Loftin, Mo.*, 230 S. W. 339.

3. **Bankruptcy—Building on Bankrupt's Land.**—The R. Co., after having agreed to build a bungalow for L. on land owned by the R. Co., went into bankruptcy, prior to which its managers and directors organized the B. Service, Inc., and induced L. to contract with it to build the bungalow, which it did. L. paid into the bankruptcy fund the balance due on the bungalow. Held, that one having an unsatisfied judgment and execution against the B. Service, Inc., for materials used in the construction of the bungalow was entitled to the fund rather than general creditors of the R. Co.; that company having acquiesced in the construction of the

bungalow on its land.—*A. B. Newbury Co. v. Tennant, N. J.*, 113 Atl. 486.

4. **False Pretenses.**—Bankruptcy Act 1898, § 17, subd. 2 (Comp. St. § 9601), excepting from release by discharge liabilities for obtaining property by false pretenses or false representations, includes liability for money so obtained, so that the liability of the president of a private corporation to it for the difference between the purchase price paid by him for property bought for the company and the price he stated to the company is not released by discharge.—*Bloemcke v. Applegate, U. S. C. C. A.*, 271 Fed. 595.

5. **Insurance Benefit.**—Bankruptcy Act, § 70a, relative to the property vesting in the trustee, shows a purpose to pass to the trustee whatever sum was available to the bankrupt at the time of bankruptcy as cash assets to be realized on surrender of a life insurance policy, but otherwise to leave to the insured the benefit of such insurance.—*Frederick v. Fidelity Mut. Life Ins. Co., U. S. S. C.*, 41 Sup. Ct. 503.

6. **Preference.**—A trustee in bankruptcy cannot recover an alleged preferential payment under Bankruptcy Act, § 60b, as amended (Comp. St. § 9644), where there is no sufficient evidence that defendant had reasonable cause to believe that the enforcement of the payment would effect a preference.—*First Nat. Bank v. Galbraith, U. S. C. C. A.*, 271 Fed. 687.

7. **Banks and Banking — Accumulating Checks.**—A bill, which alleged that a federal reserve bank had adopted the practice of collecting checks drawn on the plaintiff banks until a considerable number were on hand and then demanding payment in cash over counter for the purpose of forcing the banks on which they were drawn either to join the federal reserve system or to cease to do business, states a ground for relief, notwithstanding the right of the holder of a check to demand payment thereof in cash.—*American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, U. S. S. C.*, 41 Sup. Ct. 499.

8. **Degree of Care.**—A savings bank is not held to the same high degree of care as that required of a commercial bank respecting its depositors or creditors, and is liable to its depositors for want of ordinary care, but it does not insure a fund on deposit, nor is its work purely gratuitous.—*Bulakowski v. Philadelphia Sav. Fund Soc., Pa.*, 113 Atl. 553.

9. **Forgery.**—Where the payee of a draft on a bank had knowledge on February 1st that the draft had been drawn on the bank, and that his (the payee's) attorney had forged the indorsement of his name thereon, and for three weeks or more prior to February 1st, the payee knew that his attorney had forged the indorsement, without knowing the name of the bank on which the draft was drawn, and despite such knowledge the payee dallied with his attorney, the forger, during January and February, if not later, on his promise to make good the loss, and kept the drawee bank in ignorance of the forgery until about April 1st, the payee was negligent as matter of law, on account of his unexplained delay of 60 days in making demand on the bank, after knowledge that the draft

had been paid on a forged indorsement, and cannot recover from the bank.—*Annett v. Chase Nat. Bank*, N. Y., 188 N. Y. S. 7.

10.—**Notice of Fraud.**—The knowledge of the president and cashier of a bank that a note which the bank purchased from its president was of fraudulent inception and character was notice to the bank.—*Behnke v. Kroening*, Wis., 182 N. W. 837.

11.—**Receivership.**—A receiver of a bank was not entitled to commissions of moneys, either collected from himself, or on notes in his hands, or on notes collected by others, to whom they had been assigned as collateral for the debts of the bank.—*Butler v. Spencer*, S. C., 107 S. E. 154.

12. **Bills and Notes.**—**Foreign Corporation.**—In action on a note, a plea setting up that the corporate payee was organized under the laws of a foreign state and had no permit to do business in the state is open to demurrer on the ground that it was not alleged that the contract was made in the state, or to be performed there; that it was not alleged that plaintiff was not a bona fide holder for value, and that it was not shown that the corporate payer was doing business in the state contrary to law.—*Phillips v. Langston*, Ala., 88 So. 177.

13.—**Transfer.**—No recovery on note transferred in violation of conditions of delivery unless transferee a bona fide holder.—*Securities & Investment Corporation v. Heron*, W. Va., 107 S. E. 179.

14. **Carriers of Goods.**—**Bailee for Hire.**—A tank car, owned by the shipper, filled with gasoline, was delivered to a railroad company for the transportation of gasoline to a consignee under a bill of lading which entitled the owner to payment for the use of the car on a mileage basis. The car was not delivered to the consignee, but diverted, and was not returned to the owner for three months. Held, that the railroad company was a bailee for hire of the car, and that the contract of bailment was for its use only in accordance with the bill of lading; that its diversion was a breach of the contract, and, whether intentional or through negligence, rendered the railroad company liable for all damages sustained by the owner, including the value of its use while detained.—*Empire Refineries v. Guaranty Trust Co.*, U. S. C. C. A., 271 Fed. 668.

15.—**Damage in Transit.**—The South Carolina rule that loss or damage to goods will be presumed to have occurred while with the terminal carrier, in absence of proof to the contrary, has not been superseded or changed as to goods in interstate commerce by the Carmack Amendment and federal decisions thereunder.—*People's Hardware Co. v. Raleigh & C. R. Co.*, S. C., 107 S. E. 146.

16.—**Damage in Transit.**—In an action at common law against terminal carrier by consignee of interstate shipment injured in transit, all presumptions that existed in favor of a plaintiff in such an action prior to the passage of the Carmack Amendment to the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa) were available to the consignee, as said amendment did not change the rules relating to the "practice, procedure, or evidence" in common-law actions arising from interstate shipments.—*Pittsburgh, C. C. & St. L. R. Co. v. Larosa*, Ind., 131 N. E. 22.

17.—**Delivery.**—Where defendant railroad was fully notified as to what plaintiff intended to do with goods shipped him when they arrived at destination, such communication was sufficient to put the railroad on notice as to the resultant damages should it fail or delay in the delivery of the goods.—*Harrill v. Seaboard Air Line Ry. Co.*, N. C., 107 S. E. 136.

18.—**Lawful Rates.**—A consignee of interstate shipments who received the shipments and paid all charges claimed, which were less than the lawful rates established under the Interstate Commerce Act as a matter of law assumed liability for the only lawful rate which it had a right to pay or the carrier a right to charge, and could not escape liability therefor through any contract with the carrier, and its liability was not a question of fact to be determined from circumstances tending to show an implied

agreement.—*New York Cent. & H. R. R. Co. v. York & Whitney Co.*, U. S. S. C., 41 Sup. Ct. 509.

19.—**Transfer of Bill of Lading.**—That a transaction between shippers of hay, dealers therein, and a bank, by their transfer of bill of lading with attached draft to it, and giving of credit by it and drawing thereon by them, did not pass title to it, is not conclusively shown by the fact that after it had claimed the hay, and given bond therefor, against attachment by the shippers' creditor, it sold it through them.—*Officer v. F. & M. Nat. Bank of Hobart*, Tex., 230 S. W. 226.

20. **Carriers of Passengers.**—**Ejectment.**—In carrying out the purpose of ejecting from the car a passenger who had become boisterous and beyond control, both the conductor and the motorman would have been acting within the scope of their employment and, if they did not use unreasonable or unnecessary force, the street car company would have been free from liability for damage for the resulting injury to the passenger.—*Galloway v. United Railroads*, Cal., 197 Pac. 663.

21.—**Separate Coach Law.**—Under our separate coach law (section 4059, Code of 1906; section 6687, *Hemingway's Code*), a white passenger who, after notice and objection to the conductor, is compelled to ride in a compartment with negroes, in a coach designated for white persons, may recover damages from the railroad for violation of the statute; and this is true even though there were other coaches on the train for white persons, and the sign designating the coach had been changed by some outside agency.—*Payne v. Stevens*, Miss., 88 So. 165.

22.—**Ticket Not Contract.**—A railroad ticket is not a contract expressing the conditions and limitations usually in a written agreement, but is more in the nature of a receipt for fare and is limited and regulated by the carrier's rules.—*Summerfield v. Hines*, Nev., 197 Pac. 690.

23. **Charities.**—**Power of Legislature.**—It is not within the power of the Legislature to terminate a charitable trust, change its administration on grounds of expediency, or seek to control its disposition under the doctrine of cy pres.—In re *Opinion of the Justices*, Mass., 131 N. E. 31.

24. **Commerce.**—**Money Not "Article of Commerce."**—Money, being merely a medium of exchange, is not such an article of commerce as is protected from state regulation relative to foreign corporations by the federal Interstate Commerce statutes.—*Boddy v. Continental Inv. Co.*, Ala., 88 So. 294.

25. **Conspiracy.**—**Evidence.**—To establish a charge of a conspiracy to violate chapter 463, Gen. Laws 1917, the state must prove that defendants had concerted to teach that men should not enlist in the military forces of the United States or aid in carrying on the war with Germany. A combination for an unlawful purpose is the foundation of the offense, and an overt act in furtherance of such purpose completes the offense. All who are parties to the combination incur guilt when one does such an act. The combination need not be established by direct evidence, but may be inferred from circumstances.—*State v. Townley*, Minn., 182 N. W. 773.

26. **Constitutional Law.**—**Habeas Corpus.**—The right of appeal is a privilege which the law-making power has the right to bestow or deny, and the fact that there is no appeal from a judgment denying a petition for a writ of habeas corpus is not a denial of justice nor due process of law.—*McLaughlin v. Barr*, Ky., 230 S. W. 304.

27.—**Operation on Prisoner.**—Acts 1907, c. 215, authorizing the board of managers of institutions intrusted with the care of defectives and confirmed criminals and a committee of experts to perform an operation of vasectomy on an inmate, if deemed advisable, to prevent procreation, but giving the inmate no opportunity to cross-examine the experts who decided upon the operation, to controvert their opinion, or to establish that he was not within the class designated in the statute, denies due process of law.—*Williams v. Smith*, Ind., 131 N. E. 2.

28.—**Regulation of Rates.**—The regulation of rates for public utilities is a governmental

function coming directly within the police power of the state, so that the establishing or modifying of rates, though contractual, does not violate the constitutional provisions against the passage of any law impairing the obligation of contracts.—*United States Smelting, Refining & Milling Co. v. Utah Power & Light Co.*, Utah, 197 Pac. 902.

29.—**Religious Corporation.**—Charter of religious corporation protected by contract clause of Constitution.—In re Opinion of the Justices, Mass., 131 N. E. 29.

30.—**Contracts—Mutuality.**—A contract for board and lodgings for 10 weeks was not void for lack of mutuality because the boarders reserved the right to cancel the contract.—*Kadetz v. Harwood*, N. Y., 188 N. Y. S. 134.

31.—**Corporations—Change of Venue.**—In the absence of any other place of business in this state, the residence of a corporation in this state is at the principal place of business named in its charter, and it is entitled to a change of venue to such place as a matter of right in view of Rev. Code 1919, §§ 2327, 2328.—*McHarg v. Commonwealth Finance Corporation*, S. D., 182 N. W. 705.

32.—**Illegal Contract.**—Where a corporation makes an illegal contract to purchase its own stock from its stockholder, the company is entitled to disaffirm the contract, and on return of the stock to recover the consideration paid; likewise where the stockholder seeks to restore to the company its improperly diverted funds, and to have returned to him the identical stock unlawfully acquired from him by the company, and this may be accomplished, the policy of the state is to be best subserved by granting relief to the stockholder.—*Darnell-Love Lumber Co. v. Wiggs*, Tenn., 230 S. W. 391.

33.—**Eminent Domain—Public Use.**—Constitution held to authorize taking for development of water power for mills; "public use."—In re Opinion of the Justices, Mass., 131 N. E. 25.

34.—**Fraudulent Conveyances—Bulk Sale.**—Though a sale in bulk is void as to the vendor's creditors, unless the provisions of the act of 1915, requiring the purchaser to demand and receive a written list of the creditors and to notify them of the proposed sale, are complied with, this does not give creditors a claim upon the purchase price.—*J. C. Smith & Wallace Co. v. Goldner*, N. J., 113 Atl. 487.

35.—**Husband and Wife—Ante-Nuptial Contract.**—The fact that the prospective wife who signs an ante-nuptial contract cannot read does not of itself raise a presumption that any fraud or imposition was practiced upon her, even in the absence of affirmative evidence that it was read to her or that its contents were stated to her.—*Burns v. Spiker*, Kan., 197 Pac. 884.

36.—**Mortgage.**—In suit to foreclose mortgage executed by husband and wife contemporaneously with the execution to them by mortgagee of deed to other land and the execution by them of affidavit that mortgage was given to secure balance of purchase price which they had agreed to pay for land so conveyed, evidence that wife joined in execution of mortgage and the affidavit without knowledge or consent that she had been named as a grantee and that deed had not been delivered to her held to sustain finding that wife had signed as a surety within Burns' Ann. St. 1914, § 7855, prohibiting a married woman from entering into a contract of suretyship, and not as a principal.—*Elwood Trust Co. v. Fritz*, Ind., 131 N. E. 9.

37.—**Insurance—Class of Employment.**—Where plaintiff was insured in an accident and health policy as a "finisher" in a furniture shop, but was injured while employed in a bakery, doing shop service in putting bread in boxes, he could recover on the policy as a "baker," which was within the same class of hazards, since the word "baker" in its ordinary use respecting a bakery business has a generic meaning and includes in its scope different services connected with the bakery business.—*Futopolus v. Midland Casualty Co.*, Wis., 182 N. W. 847.

38.—**"Dependent."**—Where the by-laws of a fraternal insurer provided that a dependent of a member might be named beneficiary, a "de-

pendent" is one who is maintained by the member upon some merely legal or equitable ground, and a mere gratuitous maintenance does not satisfy the requirement; therefore, a child who was not legally adopted by the member cannot be a beneficiary, where it was removed by the member's wife on her leaving him and the member no longer contributed to its support.—*Royal Neighbors of America v. Fletcher*, Tex., 230 S. W. 476.

39.—**Insurable Interest.**—When two people are engaged in good faith to be married, they each have an insurable interest in the life of the other.—*Harden v. Harden*, Ky., 230 S. W. 307.

40.—**Military Service.**—A provision in a policy of life insurance that if the insured shall engage in military or naval service in time of war, and shall die while engaged in such service, or in consequence thereof, the beneficiary will only be entitled to recover a certain fixed proportion of the full indemnity provided by the policy, applies, whether the insured entered such service voluntarily or was inducted therein under the Selective Service Act (U. S. Comp. St. 1918).—*Nowlan v. Guardian Life Ins. Co.*, W. Va., 107 S. E. 177.

41.—**Misrepresentation.**—Where insured's statement, made in his application for the policy, with reference to previous consultation of physicians, was false, the falsity of such statement avoids the liability of defendant benefit association, unless the defense was waived, or defendant association is estopped from asserting it either by requiring additional proofs or in its statement of the grounds for rejection of the claim.—*Security Ben. Ass'n v. Webster*, Tex., 230 S. W. 219.

42.—**Misrepresentation.**—In an action on a life insurance policy, where the defense of misrepresentation of health was interposed, evidence as to whether such representations were made in good or bad faith was incompetent in view of Rev. St. 1909, § 6937, providing that no misrepresentation shall be deemed material unless it contributes to the event on which the policy is to become payable, so that it was not error to refuse an instruction on such subject.—*Burgess v. Pan-American Life Ins. Co.*, Mo., 230 S. W. 315.

43.—**Misstatement of Age.**—Where the by-laws of a benefit insurance company prohibit receiving a member above a certain age, the society is not bound by a certificate issued to one over that age whose application was false as to age, and such misstatement constitutes a defense, whether it be held a representation or a warranty.—*De Loach v. Ozark Mut. Life Ass'n*, Ark., 230 S. W. 268.

44.—**Violent Death.**—The presumption, in an action on a life policy of one killed by external and violent means, is that the injury was the result of accident and not suicide.—*Green v. New York Life Ins. Co.*, Iowa, 182 N. W. 808.

45.—**Intoxicating Liquors—Description.**—The phrase "spirituous liquors" means liquors composed in part or entirety of alcohol produced by distillation, so an indictment under Acts 1919, p. 16, § 15, declaring any person who shall make or manufacture alcoholic, spirituous liquors, or beverages any part of which is alcohol, shall be guilty of a felony, is sufficient if it alleges that the liquors were spirituous, for that includes an allegation that they were in part alcohol.—*Taylor v. State*, Ala., 88 So. 205.

46.—**State Laws.**—All provisions of the state prohibition laws, which tend fairly to the enforcement of the Eighteenth Amendment to the federal Constitution, the Prohibition Amendment, and are not in direct conflict with the Volstead Act, remain unimpaired, and may be enforced by the state courts.—*People v. Commissioner of Correction*, N. Y., 188 N. Y. S. 47.

47.—**Landlord and Tenant—Assignment of Lease.**—An assignment of a lease does not annul the lessee's obligation to pay rent unless the contract contains a stipulation to that effect.—*Hazelton v. Chaffin*, Kan., 197 Pac. 870.

48.—**Repairs.**—There is no implied warranty upon part of landlord that premises are fit for purposes for which they are leased and if tenant desired that landlord make changes or repairs, he should have such covenant incorpor-

ated in the agreement to lease.—*C. R. Miller & Bro. v. Nigro, Tex.*, 230 S. W. 511.

49. **Mandamus—Officers' Salaries.**—Where salaries of state officers and district judges are fixed by law, and payment thereof in the full amount due is refused by the state auditor, a writ of mandamus is the proper remedy to enforce payment.—*Crockett v. Tuttle, Utah*, 197 Pac. 900.

50. **Restoration to Office.**—Where a civil engineer for the city was under the civil service, and was not suspended or discharged, his remedy was not against the civil service commission to compel restoration, but by direct action to be restored to office from which he was being deprived by an usurper after the council's action in changing the name of the office, and mandamus was the proper remedy.—*State v. City of Seattle, Wash.*, 197 Pac. 782.

51. **Master and Servant—Interstate Commerce.**—A railroad employee, injured while cutting a rail in the course of repairing a track used by interstate, as well as other trains, was engaged in interstate commerce.—*Johnson v. Atlantic Coast Line Ry. Co., S. C.*, 107 S. E. 31.

52. **Medical Services.**—Under the Employers' Liability Act, an employer, though a member of the Texas Employers' Insurance Association, who engages a physician for an injured employee, may become liable for the physician's compensation.—*Huddleston v. Texas Pipe Line Co., Tex.*, 230 S. W. 250.

53. **Municipal Corporations—Breach of Contract.**—One who in good faith conveys property to a municipality, in reliance upon such an agreement, may, in case of its failure to comply with its express undertaking, recover compensation in damages for the loss sustained by reason of the breach.—*Whittaker v. City of Huntington, W. Va.*, 107 S. E. 121.

54. **Negligence.**—A pedestrian walking rapidly to the aid of one who had fallen into a trench in a street in progress of improvement, in the night time, and was calling for help, pedestrian also falling into the trench, will not be held guilty of contributory negligence, unless his act was so rash that an ordinarily prudent person would not have undertaken it.—*Whitman v. Stipp, Pa.*, 113 Atl. 567.

55. **Rates of Public Service Company.**—Rates or tolls to be charged by a public service corporation for services rendered, fixed by a municipality by ordinance as an incident to the granting of a franchise to it by such municipality, are subject to legislative control.—*Town of Brooksville v. Florida Telephone Co., Fla.*, 88 So. 307.

56. **Names—Idem Sonans.**—Though the summons and return of process gave the name of defendant as "Martha J. Hornback," though her name was "Hornbeck," she was called to take cognizance of the action, and the judgment is not void, for the two names must be considered as idem sonans, for even to an attentive ear there would be difficulty in distinguishing the names when pronounced.—*Little v. Browning, Mo.*, 230 S. W. 92.

57. **Negligence—Obvious Danger.**—If there is danger attending the work which an invitee is to do on the premises of another, and the danger is not readily apparent to the eye, it is the owner's duty to give reasonable notice or warning thereof, but owner may assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses, and need not warn of obvious danger.—*Shanley v. American Olive Co., Cal.*, 197 Pac. 793.

58. **Sales—Cancellation.**—If a seller of advertising matter had fully performed the contract by shipping the advertising matter before receiving notice of the buyer's cancellation, it could recover the purchase price of the goods under the contract, and was not restricted to action for damages from the buyer's cancellation.—*Outcault Advertising Co. v. Caruthersville Plumbing & Auto Co., Mo.*, 230 S. W. 340.

59. **Ships and Shipping—Insurable Interest.**—Charterer, having agreed to indemnify owner against loss on failure to return ship, had an insurable interest to the full value of the ship.—*Goshi Kaisha Y. S. v. France & Canada S. Co., N. Y.*, 188 N. Y. S. 131.

60. **Statutes—Conflicting Acts.**—Where two acts of the General Assembly are "passed" on the same date, and each of the acts in terms provide that the same shall take effect from and after its passage, and said acts are, within the time limit prescribed by paragraph 16, § 1, of article 5, of the Constitution, approved by the governor, but on different dates, the act last approved is, in legal contemplation, the last expression of the legislative will upon the subject covered by the act; and if the provisions of the act last approved are irreconcilably opposed to those of the act first approved, the last mentioned must be considered as repealed.—*Butts County v. Strahan, Ga.*, 107 S. E. 163.

61. **School District.**—Priv. Acts 1920, c. 42, creating a certain graded school district, defining its limits and empowering the trustees on ratification of the measure by the voters of the district, to issue and sell bonds for the purchase of a site and the erection of buildings thereon and otherwise for the benefit of said district, is both special and local, and, though the school provided for is a graded school, and the district is a quasi public corporation, act is void as in direct violation of Const. art. 2, § 29, prohibiting local, private, or special acts establishing or changing the lines of school districts.—*Board of Trustees of Fairmont Graded School Dist. v. Mutual Loan & Trust Co., N. C.*, 107 S. E. 130.

62. **United States—Priority of Claim.**—Under Rev. St. U. S. § 3466, giving priority in all cases of insolvency to obligations due to the United States, the claim of the United States on a recognizance entered into by a company for the appearance of a defendant in criminal proceedings is entitled to priority over all other claims, where the surety company became insolvent after entering into the recognizance, but before the defendant had failed to appear, regardless of whether the claim on the recognizance had matured at the time of the entry of the insolvency order, within the meaning of the New York law.—*In re Casualty Co. of America, N. Y.*, 182 N. Y. S. 829.

63. **War—Property of Alien Enemy.**—In action by American pledgees of certificates of marine insurance issued by a British insurance company, the insured goods, belonging to a German pledgor, having been captured by the British in the war against Germany, the contention that the action could not be maintained, because the pledgee would recover the full amount of the insurance certificates, and that any part thereof exceeding the amount secured by the pledge would be recovered in behalf of the German pledgor, stated no defense, as any aid and comfort to the enemy from such recovery could be prevented by exercise of the Alien Property Custodian's right to take and hold the proceeds of the recovery until declaration of peace.—*Guinness v. Phoenix Assur. Co., N. Y.*, 188 N. Y. S. 137.

64. **Warehousemen—Liability.**—Where a warehouseman has contracted to store goods in a particular place, and breaches his contract and stores them in a different place, it is at his own risk, and he is liable for any damage or injury to the goods which occurs, even without his fault or negligence.—*Tallahatchie Compress & Storage Co. v. Hartshorn, Miss.*, 88 So. 278.

65. **Waters and Water Courses—Liability for Service.**—In the absence of legislative authority, there is no lien in favor of a water company on the real estate for the water supplied either to an owner or to a tenant.—*Millville Improvement Co. v. Millville Water Co., N. J.*, 113 Atl. 516.

66. **Wills—Holograph Will.**—A letter written to a brother immediately before the writer entered a hospital for treatment reading: "Brother Richard, * * * I am going to the hospital on account of not feeling well. I hope God nothing happens, but if it does, everything is yours. Got some money in the bank, but don't know how much we owe on house. * * * (Signed) Brother Alex"—held a valid holograph will.—*Wise v. Short, N. C.*, 107 S. E. 134.

67. **Language Used.**—Use of words "wish and will" following general devise not sufficient to limit estate devised.—*Greiner v. Helms, Ind.*, 131 N. E. 20.

Central Law Journal.

St. Louis, Mo., August 26, 1921.

COMPENSATION OF JUDGES.

The argument is opened by the statement that the payment of insufficient and, in fact, insignificant salaries to American judges is a habit, not a principle nor a matter of expediency with the American people. Otherwise one would despair of civilization in the light of contrasted expenditures for luxuries presently to be given. The most generous people on earth live within the jurisdiction of the Courts of the United States, if one may measure them by usual conduct and as emphasized by their munificent gifts to the needy of the World War. American wages are notably the highest paid in the world. That Americans are willing to pay for what they want is axiomatic. That they want much is evidenced by statistics.

"Commerce and Finance," a highly respected financial paper, recently published a detailed statement showing that \$5,000,000,000 were spent during the year 1920 for luxuries, or for unnecessary things. No good purpose will be served by itemizing expenditures for soda water at half a billion dollars, or candy at nearly the same amount, for the thoughtful reader is already converted to the points we set out to emphasize, viz.: that Americans want the best and are willing to pay for it, which includes the administration of justice, and the reason for their apparent parsimony towards the courts is ignorance of the truth.

In the first place, let us have an understanding about the thing of which we are conversing. Daniel Webster simply repeated an old truth when he said that Justice was the greatest interest of man on earth. Men pray for justice and live and fight for it. It was the inspiration of the Magna

Charta and the Declaration of Independence. It is the essence of the American spirit and without it there would be no such thing as equal opportunity, civil liberty or property rights. The administration of justice is the excuse for government; if it be not its only reason for existing.

It will be conceded, therefore, that justice is of greater importance than candy and soda water, yet the money paid for each in the United States belies that fact. Which becomes important in the light of the premise that Americans are willing to pay for what they want. It has just been shown that there was spent in America, \$5,000,000,000 for luxuries in 1920. That averages substantially \$50.00 for each man, woman and child. Now the courts of the several states, both trial and appellate, cost the several states on an average of a little less than *eighteen cents* per person per year. This is the corollary to that proposition: Americans set small value on justice, they value it and are unwilling to pay for it, or they are ignorant of the facts. In plain language, a proud Anglo-Saxon race, the rightful and boasting descendants of the creators of the two greatest charters of liberty and justice on earth and the sole legatees of the great American Republic, pay, through state agencies, eighteen cents apiece a year for justice, and fifty dollars apiece a year for soda water and other luxuries. Additions by counties and cities will add unappreciably to these figures. There is acceptable authority that only twelve cents a year is paid out in judicial salaries. That would be \$12,000,000, divided amongst a little over 100,000,000 people.

By attributing the wicked condition to the ignorance of the public, a foundation was laid for indicting the Congress and State Legislatures. Their excuse for parsimony is the unwillingness of their constituents to pay. Is this not a false indictment of a practical and a just and a generous people who are willing to apply in the administration of justice the same

economic principles that rule their respective businesses and their social lives? Thirty-six cents a year per capita would double the present compensation of the judges!

The Federal Government on September 20, 1920, issued a pamphlet called "Financial Statistics of States, 1919." The figures given above were taken from the official publication by A. B. Andrews, Jr., in an article that appeared in the West Publishing Company's "Docket" for May-June, 1921. The exact citations are given in order to stimulate research by both statesmen and citizens, for if Americans are really unwilling to pay but *eighteen cents* a year per capita for the administration of justice, as Legislators would persuade one to believe, it would be a serious reflection upon their sanity. It is in order to ascertain whether it is the people or it is the Legislators that wish to use the tax money for other purposes.

The great United States, the richest nation on earth and with the most at stake, pays its Chief Justice, the man holding the highest judicial position in civilization, but \$15,000 per year. It is, of course, the great honor and not the compensation that makes the place attractive. Now, has democratic America the right to compensate in that currency? If so, why not create a few "dukes," "counts" and "baronets," and thereby extend the circulating medium to other services. It would certainly require less gold. The judge of a trial court in England receives \$25,000 a year; holds office for life and receives a pension of two-thirds of his salary when retired for age or disability. Is not rich America able to do as much? Is not England justified in this course after nearly one thousand years of experience? Strong financial inducement for the best judicial material has always been the English policy. To that policy may be attributed some of the merit of the great common law, which is the basis of American law today, and which our forefathers preserved to us while cannon yet

roared defiance in the Revolutionary War. Judges were paid enough to be rid of financial worry as to themselves and the future of their families, and to justify the application of their whole thought, energy and time to the improvement of the law and its administration. They had no outside diverting interests or temptations.

Moreover, it is not unreasonable that the Congress and Legislatures should see the matter in their own interest for, though they fill the statute books with the wisdom of a Solomon, a law is no better than the manner in which it is administered. The present policy of Congress and State Legislatures may be likened to a city that built a magnificent reservoir, filled it with plenty of pure, potable water, but then put in insufficient and occasionally foul pipes in which to convey it to the people. Just as the pipes measure the quality and quantity of water actually received by the people, regardless of the contents of the reservoir, so the courts measure the quality and character of justice received by the people, regardless of the high merit or the substantive law. Statesmen, then, should be selfishly interested in competent, well paid judges. One often wonders if they ever see it in that light.

We started out to prove that the American custom of low compensation of judges was a habit. It is a Legislative habit—a mental attitude. In pre-Civil War days the country squire was a landed gentleman and felt it a duty to serve his county without charge. Several of these squires composed the County Court. After the War of Secession the positions of County Judge and local magistrate took their places at a small salary. There have been other changes, but the records show that compensation was but slightly increased. There were always men willing and able to fill the positions in the interest of the general welfare or on account of the honor attached. There are still plenty of competent men willing, but few able, to serve as judges without suitable pay.

What is the solution of this dangerous problem? How shall the country call men of John Marshall calibre to the Bench and retain them, to the continued glory of American jurisprudence, that the American genius of government shall go onward and upward, and not backward and downward? It is by paying judges a compensation that will set them independent for life of pecuniary cares for themselves and their families, by giving them an assured tenure of office that will justify the sacrifice of their private business in the public interest. This will attract men of the highest qualifications and stimulate preparation for the sacred office.

How shall these things be done? First, by bringing the Legislative Department to see that the Judicial Department is a fixed limitation upon its own work. That the laws enacted by them will be well or badly administered, accordingly as there are maintained good or bad courts. That in order to have good courts there must be competent judges. That in order to secure competent judges there must be adequate compensation. Secondly, the legislative excuse that the people refuse to pay must be refuted by the people. Will they do it? The answer is to find a man willing to admit that thirty-six cents a year per capita is too much to pay for justice. It will hardly be necessary to contrast the expenditure of \$50.00 per year per capita spent for luxuries, as a further argument, for that would be producing shame and not inspiring patriotism.

Tell Americans the truth and the truth will set them free from the bondage of legislative parsimony. Tax money is simply being diverted to things not so vital and essential. That is the trouble. The habit must be broken and the American press can do it. Let us ever be mindful that inadequate compensation is a dangerous element in positions of trust.

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

BONUS SHARES NOT SUBJECT TO ENGLISH SUPER-TAX.—A recent volume of the English Reports publishes the opinion of the House of Lords in the case of *Inland Revenue Commissioners v. Blott*, 123 L. T. Rep. 516: (1920) 2 K. B. 657. In this decision the Lords held as did our Supreme Court, that a stock dividend ("bonus shares" the English call them) is not income but capital. The decision was by a vote of three to two.

This case raised specifically the point as to whether the respondent was liable to an assessment to super-tax in respect of bonus shares issued by a company. In this case the company had by its articles of association power to increase its capital and to distribute its profits in the usual manner, including a distribution of paid-up shares in that or any other company. It had also the usual power to create reserve funds. In 1914 the company had available for distribution, including a small carry over, the sum of £61,903. After carrying £10,000 to the general reserve fund and paying a dividend on the preference and ordinary shares, a bonus of 33½ per cent. on the ordinary shares was declared on the recommendation of the directors, such bonus to be satisfied by a distribution among the shareholders of shares in the company credited as fully paid. In the year ended the 5th April, 1914, the respondent received as part of such distribution shares, and again a further lot of shares in respect of the year ended the 5th April, 1915. Having been assessed to super-tax in respect of those allotments of shares, the respondent took the point that he was not liable to be assessed to super-tax because the shares allotted were capital and not income. The shareholder had no option but to receive the bonus in shares. The courts below decided in favor of the respondent, and the commissioners appealed.

The Judicial Committee of the House of Lords (Lords Dunedin and Sumner dissenting) held that both in principle and on authority the transaction in this case was one in which the company was in law dominant on the question whether the allotment was to be capital or income for all purposes, and therefore in the circumstances the respondent received neither income nor profits assessable to super-tax.

THE RECENT HISTORY OF THE PSYCHOPATHIC LABORATORY OF THE CHICAGO MUNICIPAL COURT.

The tenth and eleventh annual reports of the Municipal Court of Chicago for the calendar years 1916 and 1917, contain a report of the first three years' work of the Laboratory covering 4,447 cases, making a larger body of facts than has ever been brought together on this subject, it is confidently believed. This epochal report cannot be repeated here, nor can a complete understanding of the situation with respect to crime and defectiveness be acquired from the two reports.

There has been one regret and that is that the available force of assistants has been limited so that the largest possible service could not be rendered. But the force has been large enough to maintain the largest clinic in abnormal psychology which has ever been conducted. It should therefore not be a matter of surprise that no novel facts should be disclosed after nearly five thousand cases had been examined and recorded. Of unusual cases there will possibly never be an end; but no new classes have been found necessary in the three years which have elapsed since the first general report of the Laboratory; no new methods have been suggested; there has been no attack upon the findings of the Laboratory to render necessary any revision of judgment. In consequence of this the present reports are necessarily cumulative and confirmatory.

As to methods it may be said that in every case complete examination is made, embracing physiological, neurological, psychological, hereditary and environmental data. In every case complete written records are made and preserved. Every record is signed by the Director, Dr. Wm. J. Hickson. No report is submitted to a judge which is not authenticated by the Director who remains at all times entirely responsible for every report. This plan has been followed from

the first day. There has been no informal reporting, no whispering to judges, no guessing, no evasion of personal responsibility.

Another outstanding feature of the situation is that no finding of the Laboratory has ever been successfully rebutted. Of prejudice and ignorance and mental inertia there has been at all times sufficient, as well as some attempt at hostile criticism in the first year or two of this work. But these have steadily diminished, and as the work of this clinic gains every year, a stronger hold on the opinions of students and all other observers, it is a matter of deserved congratulation that it can be said that in no instance, out of possible thousands, has it ever been made to appear that a wrong diagnosis has ever been made. Thus have the methods of investigation and recording been substantiated by the inexorable tests of experience.

On the contrary the Laboratory can point to innumerable instances of corroboration. The most dramatic and forceful, doubtless, are those corroborations presented by the conduct of subject cases who have been recorded after examination as belonging to a dangerous class of defectives. For instance, there have been thirty or more instances of killing by young men who were at some previous time examined after committing lesser offenses, and found to be of the potentially dangerous type, namely, a combination of low intelligence and abnormal affectivity. As the number of cases increases the community more and more finds the diagnosis of the Laboratory confirmed by the actual life history of defective individuals. It has been said, and is undoubtedly true, that one could go to the index files of the Boys' Court and pick out, among more recent cases, a dozen in which this forbidding diagnosis has been made and say with assurance that within six months one or more of this little group would be arrested charged with murder; within a year, two or more, and so on.

The great, and ever increasing value of the Laboratory is thus seen to be in its proved *predictability* in certain clearly established classes of defectiveness. This is indeed something new, but no innovation; it is simply cumulative and corroborative.

The beginning of an understanding of defectiveness in relation to crime has been said to lie in the distinction between intelligence defects and defects of affectivity. A fairly sharp distinction can be made, and must be understood, as between intelligence, or the capacity for rational thinking, on the one hand, and affectivity (or feeling or emotionality) on the other. Broadly speaking these two main categories embrace the psychological capital of every person.

There is a very general understanding of intelligence defects, the methods for discovering and gauging them, and their consequences, throughout the country. This is a very new branch of science, relatively speaking, especially in this country. Until a few years ago there was no manual on this subject in the English language. It was not until 1912 that the Binet-Simon intelligence tests were first put to a practical use in this country, and then only tentatively, at Vineland, N. J., under Dr. Goddard. But they quickly commended themselves to Dr. Goddard and his staff, replacing guesswork and uncertainty with an unlooked-for accuracy. Knowledge of this subject spread rapidly. For several years now there have been in a number of states numerous investigators in this field of subnormal intelligence. A great deal of substantial knowledge of this subject has been acquired through them. It is generally understood that a person skilled in the use of the Binet-Simon tests could in an hour or two determine subnormal intelligence and give it quantitative rating. This phase alone marks a tremendous achievement. It has thrown a flood of light on a field formerly dominated by guesses, prejudice and controversy.

But the very success of intelligence testing has tended to make further progress difficult. It has afforded to the operator a con-

venient formula or tool by means of which, with very little effort and limited experience, the subnormal in intelligence could be sorted out and many problems of conduct successfully explained.

Invaluable as they are, these tests have possessed an almost perilous facility; they have been pushed quite beyond their capabilities by enthusiastic investigators who often are not neurologists, or psychiatrists or even physiologists. Such users are unable to qualify their findings by numerous complexes. Their success in simpler cases gives them unwarranted confidence in respect to difficult complexes which are certain to confront them.

The first great vogue for intelligence testing came in the years 1913 to 1917, speaking roughly. By the latter year the more experienced found themselves confronted with an inexplicable phenomenon. It came about in this way: so many inmates of prisons and reformatories had been found defective in intelligence that the investigators had come to look upon intelligence defect as the one overshadowing cause for delinquency. This theory, though incorrect, was in a way justifiable in that stage of the inquiry. But, and here is the crux of the situation, thorough testing of the inmates showed that there were always some who were normal in intelligence, and yet highly mischievous, not to say incorrigible.

This newer body of facts, discovered in time by a number of independent investigators, negated in a way a theory which not long before had been announced as impregnable. In the past three or four years this has more and more come to be the stumbling block of the investigator who has lacked thorough preparation, as, unfortunately, most of them have, by force of circumstances. As a rule the most hopeless delinquents are not those rated by the Binet-Simon tests. As these more dangerous cases have been observed, the center of study has been shifted, for these have been seen to constitute roughly a class in themselves, and

one which has baffled the ordinary investigator.

Before quitting the subject of intelligence defect it should be noted that a great injustice has been done to this unfortunate class by the earlier judgment that this kind of defect accounted in the main for delinquency. It should be understood that a defect in intelligence is a defect in intelligence—just that and nothing more. There is abundant proof, and no disposition in any quarter to combat the theory that feeble-mindedness does cause a considerable volume of delinquency. But that it accounts scientifically for a typical crime is wholly fallacious.

The feeble-minded person is limited in coherence of thought; his judgment is unreliable and hence his dependence upon others is increased. This means that he is less resistant to environment than normal persons. He is often a victim of suggestion, or influence or threats. He falls a victim to his own appetites. He tends to lack confidence in his own ability to cope with the problems of life, especially where life is a continual battle for survival.

But, on the other hand, there is nothing essentially criminal about the feeble-minded person. The reason for that is that disposition, or temperament, or the will that shapes conduct are only secondarily influenced by intelligence. There is in the mind of every person of normal affectivity a controlling disposition to accord with the standards of conscience; to accord with society's rules; to cling to good and to abhor evil. The sum of these qualities are sometimes called soul, and sometimes called conscience. The person not abnormal in affectivity has no inherent tendency to do harm to others.¹

(1) A clearer understanding of the relation of intelligence defect to crime is rapidly supplanting the uncompromising theories of a few years ago. It was, of course, inevitable that knowledge of mental defectiveness limited to intelligence defect should have borne down harshly on the unlucky moron.

There are many feeble-minded persons of both sexes and all ages who have entirely normal

The controlling factors of conduct then are beyond the reach of intelligence tests, as investigators everywhere have found out in recent years, so convincingly, in fact, that for the past two or three years their former volubility has been succeeded by a conspicuous reticence.

It is in respect to its explanation of the basic springs of conduct, and so of the ultimate causes for criminality, that the earlier report of the Chicago Municipal Court is most significant. The seat of the emotions is physiologically distinct from the seat of intelligence. (We do not intend to convey the idea that there is not a great interaction between the cortex and the basal ganglia. There must inevitably be continual interdependence between these principal divisions of the brain, but a treatment of them separately is necessary to an understanding of this subject). What the earlier report showed in addition to the accumulated knowledge concerning feeble-mindedness was the entirely distinct abnormality of defect of emotions or affectivity. Any person who accepts the teachings of science that intelligence defects are attributable to definite physical lesions, and who considers the physiological distinction between intelligence and affectivity, will instantly admit the presumption that the basal ganglia must, in the nature of things, be subject to abnormalities of a sort readily comparable with those which produce, in the cortex, intelligence defect.

This is all primary and indeed, quite indisputable. The significance of the last re-

emotions. Such a defective may cling to good and abhor evil just as surely as any person of normal or exceptional intelligence. Indeed, persons who have had much experience in this field agree that many of the feeble-minded are quite as lovable and quite as capable of reciprocating love and good treatment, as the normal minded.

Morality is not dependent upon intellectual power to any considerable degree. The feeble-minded are, of course, more likely to make mistakes because of inferior judgment. They are, in a measure, irresponsible. But they may possess all the qualities of character and to the limit of their power resist evil doing. Such cases, and they are numerous, will more readily lean upon and follow good advice than bad.

port of the Psychopathic Laboratory of the Chicago Municipal Court lies in the fact that it classifies the defects of affectivity, and this is the beginning of a true comprehension of behavior or conduct abnormality. Roughly speaking the classes of emotional defect fall into two general categories—the hyperboulc (those who are keyed abnormally high in emotionality), and those having dementia praecox (practically all of whom are subnormal in emotions). In the first class are those whose fantastic mental processes are registered in conduct which is too intense; the excitable, those often with overdevelopment of conscience. In the second class are those more or less lacking in normal feeling. In proportion to the extent of their defects, they lack all the social emotions registered in pity, gratitude, respect, love, obedience, kindness and so forth. They are in the same proportion marked by hardness of sensibility, by cruelty, by selfishness and all other social characteristics.

The conduct of the dementia praecox defects may be and often is, bizarre, as in the cases of the hyper-emotional, but it is also marked by stubborn resistance, by hardness, by cruelty, by a failure to appreciate consequences of a prejudicial sort, both to the victim and to his associates. In plainer language, moral qualities are submerged or actually absent. There is no guiding conscience.

That these commonly observed characteristics are pathologic; that they have standardized symptoms, and especially that they are diagnosable by psychiatric and psychological means, is a tremendous fact which is established by the earlier reports of the Laboratory² and which fits all the facts of the situation, and constitutes the greatest triumph of science in our generation.

It is obvious that we have here the springs of conduct far more elemental and more influential than intelligence defect. A person who is feeble-minded may fall into delin-

quency and is likely to in a difficult environment. But a person with subnormal affectivity will violate social rules under any conceivable environment short of absolute control. This is proved by the failure of the best correctional institutions to reform the victim of emotional subnormality. They are types which may well be called moral defects. They have no inherent controlling instinct to do right because doing right confers pleasurable emotion, as have the normal and the purely feeble-minded. On the contrary they have no instinct but the instinct to gratify appetite and selfish motives, come what will.

The great clinic afforded a psychopathic laboratory attached to the criminal courts of a large city permits of examining a multitude of persons having subnormality in every degree, for it naturally exists in all shadings, from a slight defect to one so great as to make its victim as dangerous as a savage brute. Dementia praecox as explained in the last report of the Laboratory² exhibits three principal characteristics: the quality of inhibition, or being shut-in, or resistant; the quality of changeability of character, and the quality of split association processes.³ The first and the last, as here stated, are practically always present and observable.

But this understanding of abnormal affectivity does not in itself explain criminality. Just as this abnormality may exist in all degrees, just so is it found to be co-existent with all degrees of intelligence. There are numerous cases of dementia praecox in which intelligence is normal. In some cases there is exceptionally good intelligence. Such persons will exhibit erratic conduct, frequently anti-social in nature, but their intelligence, their appreciation of standards of conduct and consequences of immoral and illegal acts is so keen that they may entirely avoid criminal conduct.

In other instances the dementia praecox victim has normal intelligence. He will ordinarily steer a safe course, breaking the law only when his environment imposes ex-

treme pressure, or when temptation is specially severe. It is not that he has any great compunction to live a decent life, but that he realizes the danger of giving way to his appetites and passions. Of course, this will depend not only on the degree of intelligence, and the nature of the environmental stresses, but also upon the degree of emotional defect. There is as yet, and perhaps never will be, a standard measure for gauging degrees of emotional defect. When an expert tests for intelligence he is able to give a definite rating, as for instance, an intelligence equivalent to that of the average of thousands of normal children of the age of eight years. This will be a dependence rating, useful in comparisons. But there is no such simple and positive rating for emotional defect. The psychopathologist must, in his own mind, determine as closely as possible the extent of the defect. Possibly some time there will be a method of standard rating.

Finally dementia praecox is likely to be found in connection with defective intelligence. Here, it is obvious, we have the criminal type, or at least the potentially criminal type, for of course the environmental factor always exists as part of the equation. In the former report, Dr. Wm. J. Hickson³ used this language: "A defective intelligence is a misfortune; a defective affectivity a calamity, and a defective intelligence and affectivity a catastrophe."

The dementia praecox subject of low mentality living in a competitive environment has little chance, especially during adolescence, when appetites and passions are keen, to avoid criminality. Ordinary avenues to comfort and luxury—even to bare necessities, are closed; the victim cannot hold a job long even if he tries. He takes the

shortest course to satisfy his needs. This means some crime involving brutality. The choice of crime will depend largely on the intelligence factor. These victims of dementia praecox and feeble-mindedness break down early in life. They come into conflict with their environment usually at a tender age, as shown by Judge Trude's report on the Boys' Court. They usually have Juvenile Court records. Before they are seventeen they have been in a reformatory. Between the ages of seventeen and twenty they usually commit serious offenses. The best reformatory methods cannot check their drift toward criminality. For them some new institution is demanded, and we hope will be supplied by the 1921 legislature. The tables show cases sent to Pontiac (the boys' reformatory), cases sent there when the examination followed a first term, and also cases which served in Pontiac two or more times.

There is one phase of the Laboratory's work which has been growing in importance in the past two years. It arises from the tendency of police officers and others to gather in suspected persons, many of whom show signs of insanity. Since the Laboratory has not had a force adequate to meet all needs, it has frequently been necessary to favor these cases in making a selection among those offered.

The Laboratory has thus tended to become a clearing house for psychopaths of an active and menacing sort, and for victims of outspoken insanity and other potentially dangerous psychoses. In this connection interest attaches to a table filed with the last report, showing the nature and disposition of one thousand consecutive cases committed to the Psychopathic Hospital and to feeble-minded institutions and asylums after examination in the Laboratory. This list reveals the Laboratory in the role of an active social prophylactic agency.

At the present time commitments based upon Laboratory examinations are being made at the rate of one thousand a year. It is obvious that there is in this a great

(3) Dr. Hickson is one of the few expert psychiatrists in this country. He is a graduate of the University of Pennsylvania and spent two years in the European clinics for the insane, namely, Kraepelin's, Zieken's and Bleuber's Clinics, where the psychological, rather than the clinical method of approaching mental disease, dominates. This article is based on the results of Dr. Hickson's work.

deal more than social adjustment. There must be a great deal of crime prevention. Among these unfortunates are numerous cases of paranoia who are eased of their dangerous psychoses by timely treatment. We cannot gauge the benefits here precisely, but there is reason to believe that there lies in this growing field a great deal of genuine crime prevention. Compared with the millions of dollars which it costs to send a few hundred criminals to prison each year, this side of the Laboratory work illustrates very clearly how one dollar spent in crime prevention accomplishes more than \$1,000 spent in punishment or attempted correction after the crime has been committed.

As recently as three years ago there was still a considerable amount of skepticism and open opposition to the findings of the Psychopathic Laboratory. This was not only natural and unavoidable, but actually wholesome. If it were not for its ability to conquer adverse criticism, there could be but little authentic science. But considering the tremendous distractions of war time and the years that have followed, it is really astonishing that the main body of opposition has faded away in so short a period. There is only one phase of this which appears to deserve comment at this time, and that is imagined differences of opinion based mainly on difficulties of an unstandardized nomenclature.

Such disagreement as to terms has been common to all developing branches of science. It is easy enough for an unprejudiced observer to say: "First agree on the terms employed in your science; standardize them and thus narrow the field of controversy and make the issues definite." But this is something which cannot be done forthright, however desirable. Lack of agreement as to definitions must persist for a time. In such a comparatively concrete field as applied electricity, it was many years before investigators could agree upon a standard vocabulary. Until that time the language had to be what each writer conceived to be most appropriate. The uncertainty was finally

overcome by the adoption of arbitrary symbols, such as watt, ohm, ampere, free, in their new use, from traditional prepossessions.

The term "dementia praecox" is especially unfortunate, but we employ it because of its standard meaning in European clinics where this disorder was first classified. Its derivation is unfortunate, and it had come to have a different meaning in American use. We have employed it, in part, for lack of any better term.

In Chicago the newspapers have adopted the use of the word "moron," which properly means a person limited in intelligence to the grades represented by average normal children between the ages of seven and twelve, to describe a psychopathic person with psychoses of sexual perversion. This is probably due to the lack of any other word short enough for a head-line. The perversion of the word must be combatted, even though we cannot supply any substitute which will serve the limitations of the head-line writer.

So far as we can judge, the former hostility on the part of "environmentalists" is rapidly waning. While stressing the importance of heredity, there has been at no time a disposition on the part of Dr. Hickson to deny or under-rate the importance of environment. Though viewed as a secondary factor, environment is always a part of the equation, and frequently may be the determining factor. To the student of biology there is no war between heredity and environment. Neither can be eliminated from the problem of defectiveness or crime.

When one says that there is no cure for mental defectiveness, he means that inherited maladjustment of any part of the brain cannot be rectified in the nature of things. But the consequences of such defect may be in a measure offset and minimized by control of environment. There still remain great and necessary steps for the saving of the individual and the protection of society in which environment control, extending all

the way from hospital treatment or long prison terms to probation, is a main reliance.

There will always be crime because there will always be individuals whose inherent powers and reactions are far below the normal of social and legal standards. A raising of these standards automatically increases the number of delinquents. In our intensive civilization many acts are crimes which in a primitive society would be but little out of place and among savages rate as virtues.

But at the present time there is a great deal more crime than is necessary, especially of the more brutal kinds. All over the country we hear of crime waves. Even discounting the excess due to transitory causes following the war, there is left in the United States a great body of preventable crime. Attempts have been made to excuse this on the ground that lawlessness of all kinds is inseparable from political liberty. This reason fails when we compare our conditions and our crime statistics with such democratic countries as Switzerland, Norway and Canada.

The psychopathic laboratory in connection with a criminal court enables us to test practically the operation of penological theories to ascertain how they have actually worked in the cases of specific individuals. This is but carrying the scientific method into a new domain, comparable in principle with experimental tests made in recent years with respect to physiological theories. We have seen, in the latter field, how opinions, hoary with tradition and supported by many illustrious names, have been destroyed by simple practical tests carried out in the unprejudiced spirit of scientific inquiry.

The scientific method has been by no means restricted, in practical investigation, to physiology. A vast new basis for the materials of industry has been created through analytic and synthetic chemistry—the work of the patient laboratory investigator—incalculably augmenting our wealth, in the past few decades. In such eminently practical, and equally scientific

fields as agriculture and animal husbandry a revolution has been worked; many inherited theories have been junked; others have survived and received scientific explanations, and many new reactions have been observed and given place in a scheme of natural law.

In method and purpose modern psychopathology now takes its place among these great studies for human advancement. Its laboratory is comparable with the laboratory of the physicist, the chemist, the metallurgist, the zoologist, the biologist; in broad terms its methods are identical. The material is intensively studied from every angle and classified in accordance with its nature and reactions. Of course the particular technique of the psychopathic laboratory is peculiar to itself, having but little in common even with such a closely allied field as normal psychology.

Until recently, in our own country, at least, there has been no conveniently accessible body of material available for this study. The criminal court clinic and the segregation of defectives are of recent origin. The clinics are at present, and probably will for a considerable time be, more varied in material and more fruitful than the institutions for defectives, which are only just coming into being.

The keeping of precise, signed records by the Laboratory not only conserves personal responsibility, but also makes it possible to abstract information on any category, with individual figures and averages. It is possible, as illustrated by the numerous tables accompanying the earlier report, to show the situation with respect to any class of offenses, or any age group, either sex, or any of the various types of defectives. By this means all the information acquired in routine work remains available for comparison and analysis criminology, and to some extent sociology, derives from this body of knowledge proved laws which can be relied upon.

The following are some of the deductions which appear justified by more than six

years of systematic and consistent intensive study, covering nearly 20,000 cases:

1. The entire crime problem is largely a problem of adolescence. Few serious crimes are committed by persons who have not revealed wayward conduct before attaining their majority.

2. The boys between the ages of sixteen and twenty-one who commit the more serious offenses are found to have records of conflicts or criminal conduct extending back to an early age. This emphasizes the need for identifying these individuals at the beginning of their careers if there is to be successful prevention of crime.

3. Until recently crime prevention has implied two things: first, enough patrolmen to make the commission of crime difficult; second, sentences to effect reformation and to deter potential delinquents. The first theory has some validity, but does not reach very far. The second has been seen to have a measure of falsity ever since correctional methods were applied. Knowledge of mental defectives explains readily why certain individuals are not deterred by the punishment of others, or even by their own punishment.

4. Crime prevention is now seen to imply control of that relatively small element, which because of mental abnormality, fails to react properly to correctional or punitive treatment.

5. The first step, obviously, is to identify and tag these individuals. The first preventive work will probably in time be that done among backward and incorrigible pupils in schools, both public and parochial.

6. The ordinary routine of confinements for short periods is wholly ineffectual in the cases of defectives. Reformatories can not really correct the essentially dangerous individuals, those having defective emotionality coupled with inferior intelligence. On the contrary, these individuals corrupt the purely feeble-minded inmates, making endless trouble for the managers. Such cases also tend to bring probation methods into disrepute.

7. In practically every case a serious offense is committed only by a person who has a record of lesser offenses. *Serious crimes are committed between prison terms.* Periodic liberation of the dangerous types is certain to result in failure.

8. With present experience continued instances of delinquency impute mental defectiveness, the nature of the offense usually defining the type of defect.

9. Real prevention implies the establishment of an institution, or possibly several for different grades, in which dangerous defectives can be segregated to receive appropriate treatment, largely of an occupational nature.

10. It is highly important that the intimate relation between delinquency and defectiveness be understood by all persons concerned with handling of delinquents, to the end that suspected cases be examined before being placed on parole from prisons. Many murders could be prevented by sending incorrigible boys from Reform Schools to a farm colony, instead of releasing them to continue their hopeless careers.

11. The prevention of brutal crimes, which is the crux of the crime problem, must come through recognition of the problem as one of mental defect. Moral defects are embraced in this general term. Reform of rules of criminal procedure is a minor consideration. The problem is mainly that of psychopathic study and subsequent administration.

12. There is really nothing new in the situation except the means, through psychological and psychiatric means, to detect and classify mental defectiveness. It has been accepted for generations that some delinquents would be reformed through punishment, or correctional treatment, and that others would only be rendered more helpless. Until recently there has been no way to sort out the delinquents and apply appropriate kinds of treatment to the two classes.

The only way was to treat them all as reformable until such time as every means failed and a crime sufficiently crass was

committed to justify a long sentence. This was a classification based on the trial and error method. The errors constituted the heart of the crime problem.

HARRY OLSON.

Chicago, Ill.

MASTER AND SERVANT — WORKMEN'S COMPENSATION.

CLARK v. VOORHEES.

Court of Appeals of New York. April 19, 1921.

131 N. E. 533.

Where an employee left his employer's place of business for the purpose of going to a restaurant between 400 and 500 feet away for a cup of coffee and was struck by a motor truck while in the public street, the injury did not arise out of the employment or in the course of the employment within the Workmen's Compensation Law.

McLAUGHLIN, J. This appeal is from an order of the Appellate Division, Third Department, affirming, two of the justices dissenting, an award of the State Industrial Commission, made under the Workmen's Compensation Law (Consol. Laws, c. 67) to the widow of John C. Clark.

The facts, as found by the State Industrial Commission, are that Clark, for some time prior to his death, was employed as a salesman by William Voorhees, a wholesale dealer in fruit and vegetables. Early in the morning of May 30, 1918, Clark left his employer's place of business for the purpose of going to a restaurant between 400 and 500 feet away to get a cup of coffee. While in a public street going to such restaurant, and between 250 and 300 feet from the employer's place of business, he was struck by a motor truck carrying United States mail, and sustained injuries from which he died shortly thereafter.

The validity of the award affirmed by the Appellate Division is challenged by the employer and insurance carrier on the ground that the injuries which resulted in Clark's death did not arise out of and in the course of his employment.

I am of the opinion that the injuries which Clark received, and which resulted in his death, did not arise out of and in the course of his employment. The words "arising out of and in the course of the employment" have a clear and

definite meaning, and an award can be made under the statute only when the injuries arise out of both. *Matter of Schultz v. Champion Welding & Mfg. Co.*, 230 N. Y. 309, 130 N. E. 304; *Matter of Daly v. Bates & Roberts*, 224 N. Y. 126, 120 N. E. 118; *Matter of Heitz v. Rupert*, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. This injury did not arise out of either. When the decedent left the employer's place of business for the purpose stated, and while walking in the street, he was not doing anything which he was employed to do; nor was it anything incident to or connected with the employment. It was no more a part of his employment than it would have been had he started for his own home for the purpose of getting his breakfast. The business of the employer ended when he got into the street. *Armstrong, Whitworth & Co. v. Redford* (1920), App. Cas. 757; *Davidson v. M'Robb* (1918), App. Cas. 304. While on the way to the restaurant he was engaged in his own personal affairs.

This court has recently held that, where an employee was injured while on his way to the place where he was to render service, such injuries did not arise out of the employment and were not connected therewith (*Matter of Kowalek v. N. Y. Consolidated R. R. Co.*, 229 N. Y. 489, 128 N. E. 888; *Pierson v. Interborough Rapid Transit Co.*, 184 App. Div. 678, 172 N. Y. Supp. 492, affirmed 227 N. Y. 666, 126 N. E. 920; *Matter of Schultz v. Champion Welding & Mfg. Co.*, supra), also where a workman left the employer's premises to go to his home for dinner (*Matter of McInerney v. Buffalo & S. R. R. Corp.*, 225 N. Y. 130, 121 N. E. 806), and where a workman stopped work and went of his own volition to another part of the building in which he was employed, to speak to an employee who was about to leave the place (*Di Salvio v. Menihan Co.*, 225 N. Y. 123, 121 N. E. 766).

The conclusion thus reached renders it unnecessary to pass upon the other questions raised by the appellants.

The order of the Appellate Division and award of the State Industrial Commission should be reversed, and the claim dismissed, with costs against the Industrial Commission in this court and in the Appellate Division.

Order reversed, etc.

NOTE.—*Street Accidents as Compensable Under the Workmen's Compensation Acts.*—In regard to injuries received by employees while using the public streets and highways in the course of their employment, the courts have not formulated any rule of value for determining whether or not the accident or injury arises out of the employment. Many courts have adopted the rule that

when an employee is injured in the street from a cause to which all other persons using the street are likewise exposed, the injury cannot be said to arise out of the employment.

But on the one hand, it has been held that where a solicitor and collector for a life insurance company was injured by a street car while he was running to board another car, in the course of his employment, such injury arose out of the employment, *Moran's Case*, Mass. (1920), 125 N. E. 591, 5 W. C. L. J. 400, while on the other hand, it has been held that an employee whose duties took him into the streets, and who was injured by slipping on an ice-covered sidewalk while going to board a street car, was not injured by an accident arising out of his employment. *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310, 10 N. C. C. A. 345. See similar holding in *Donahue's Case*, 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A 215, 14 N. C. C. A. 491.

In another case it appeared that an employee's duties required him to write letters and mail them at a street box, and that while returning to his place of employment, after mailing a letter, he was struck and injured by an automobile. It was held that the injury arose out of his employment, because "the accident was a natural accident of his work resulting from the exposure occasioned by the necessity of his going upon the street while performing such work." *Globe Indemnity Co. v. Industrial Acc. Com'n*, 36 Cal. App. 280, 171 Pac. 1088, 2 W. C. L. J. 31, 16 N. C. C. A. 907.

Of these cases it is suggested that the Michigan case is entirely wrong, the Massachusetts case partly wrong, and that in the California case the Court has taken the correct view. When the place of work of an employee is the public streets, then the dangers incident to the use of such streets become dangers that are incident to his employment; and the fact that the traveling public generally are equally exposed to such dangers cannot have any bearing upon the question. Those dangers are incident to the employment as matter of fact, and this fact is not changed by dragging into the question extraneous and immaterial facts for the purpose of spinning nice theories. The employee is subjected to the dangers of the street in exactly the same manner in which a factory worker is subjected to the dangers of the factory while in the course of his employment. Nor does it make any difference that the employee is subjected to greater risks of injury because they are more constant than those that are incidental to the occasional and casual use of the streets by persons who use them in the ordinary way. It makes no difference whether the risks he is exposed to are more or less than those to which the public generally are exposed. They are dangers peculiar to the place of the employment, and it is of no consequence where that place is. "The causative danger was peculiar to the work, in that, had he not been on the street in the course of his duty, he would not have been injured." *Globe Indemnity Co. v. Industrial Acc. Com'n*, 36 Cal. App. 280, 171 Pac. 1088, 2 W. C. L. J. 31, 16 N. C. C. A. 907.

However, in order that dangers of this character may be said to be incident to the employment, the work of the employee must take him into the streets; and when he incurs the dangers

of the streets for purposes of his own, entirely unconnected with his employment, he cannot recover compensation for injuries resulting therefrom. *Balboa Amusement Co. v. Industrial Acc. Com'n*, Cal. App., 171 Pac. 108, 1 W. C. L. J. 747, 16 N. C. C. A. 906.

An employee cannot recover compensation for injuries by being struck by an automobile while riding his bicycle home to lunch during noon hour. *Taylor v. Binswanger & Co.*, Va., 107 S. E. 649.

Other cases in point are, *Maryland Casualty Co. v. Industrial Acc. Comm.*, Cal. App., 178 Pac. 542; *Consumers' Co. v. Ceislik*, Ind. App., 121 N. E. 832; *Rogers v. Rogers*, Ind. App., 122 N. E. 778; *Keaney's Case*, Mass., 122 N. E. 739; *Haddock v. Edgewater Steel Co.*, Pa., 106 Atl. 196.

ITEMS OF PROFESSIONAL INTEREST.

THE RECENT MEETING OF THE WISCONSIN STATE BAR ASSOCIATION.

The annual meeting of the Wisconsin State Bar Association was held at Chippewa Falls, with headquarters at the new Hotel Northern, June 23d, 24th and 25th. The meetings were held in the Elks' club rooms, which occupy the entire fifth floor of the hotel. The Chippewa County Bar Association spared no effort to show their hospitality and royally entertained the visiting members of the State Association, special entertainment being provided for the visiting ladies. The meeting is generally conceded to have been one of the most enjoyable and profitable the Association has ever held.

The meeting opened on the morning of June 23rd, with an address of welcome by Hon. James O'Neill, Mayor of Chippewa Falls. This was responded to briefly by President Thompson, who then proceeded to deliver his annual address, the subject of which was "Extension of the Powers of the Bar." This was followed by reports of committees and business.

In the afternoon the following question was presented for discussion:

Is the present method of litigating questions of law and fact before commissions such a departure from the common law theory of trial in open court that it should be either discarded or radically changed; and is such method especially objectionable in connection with existing provisions of appeal?

The discussion of this question was opened for the affirmative by Mr. J. G. Hardgrove of Milwaukee, and Mr. C. T. Bundy of Eau Claire, while Mr. C. D. Jackson of the Railroad Commission, led the discussion on the negative side. Mr. John B. Sanborn of Madison, and

Mr. Henry J. Killilea of Milwaukee, also took part in the discussion.

The afternoon session was followed by an automobile ride to Wissota Dam and through Chippewa's wonderful natural park comprising some 300 acres. Upon the return to the hotel at six o'clock, the members, with their wives and friends, were served with a buffet luncheon at the Elks' club rooms, followed by dancing.

The evening session was held at the Court House, where Dr. F. L. Paxson, Director of the Department of History of the University of Wisconsin, delivered an interesting address on "The Frontier's Influence on the Development of American Law."

On the following day, Ex-Congressman James W. Good, formerly of Cedar Rapids, Iowa, but now practicing law in Chicago, addressed the convention on the subject of "National Finance."

The sessions were brought fittingly to a close by a sumptuous banquet served at the Hotel Northern, attended by about 150 members and their wives. The principal address of the evening was delivered by Hon. Charles S. Cutting of Chicago, upon the "Duty of Bar Associations Toward an Elective Judiciary," in which he set forth in an interesting way the recent situation in Chicago with regard to the election of judges and their control by political factions, and how the bar association there met this difficult situation. Other speakers of the evening were Judge Doerfler of the Wisconsin Supreme Bench, and Mr. B. R. Gogins of Wisconsin Rapids.

Hon. John M. Whitehead, of Janesville, was elected president for the ensuing year, and Gilson G. Glasier, Madison, secretary and treasurer.

CORRESPONDENCE.

EFFECT OF THE "END OF THE WAR" ON THE VOLSTEAD ACT.

Editor, CENTRAL LAW JOURNAL:

Is not the Volstead Law *functus officio ex vi termini*? The opening words of that law are as follows:

"After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man-power of the Nation, and to increase efficiency in the production of arms, munitions,

ships, food and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits."

Barnes' United States Statutes Supplement, Section 8350a, p. 358.

Did not the orders of President Wilson, demobilizing the army, supply the place of a proclamation? The statute does not say in what form the President shall make his proclamation.

I put these questions to you because I am very reliably informed that a proclamation that "The War is Ended" will no doubt be issued; that the delay has been due to deciding upon the form of the proclamation.

My suggestion is, that the only form required is a simple statement declaring the War ended. Whatever legal effect said proclamation may have will depend upon the terms of the legislation upon which it will operate, and that effect will be decided, not by the terms of the proclamation, but by the simple fact that the proclamation has been made, be its language what it may. It will be for the Courts to decide what the legal effect is of the proclamation of the single fact that the "War is ended."

Yours truly,

FREDERICK G. BROMBERG.

Mobile, Ala.

HUMOR OF THE LAW.

"You admit, then," said an Alabama judge, "that you stole the hog?"

"Ah sure has to, judge," said the colored prisoner.

"Well, nigger, there's been a lot of hog stealing going on around here lately, and I'm just going to make an example of you or none of us will be safe."

Rose, the garrulous domestic, can give you facts of history—international, dramatic, scandalous—right off the bat without a moment's hesitation.

"How do you manage to remember all these things, Rose?" inquired her employer the other day.

Then Rose came back with the infallible rule for memory training.

"I'll tell ye, ma'am," says she. "All me life never a lie I've told. And when ye don't have to be taxin' yer memory to be rememberin' what ye told this one or that one, or how ye explained this or that, ye don't overwork it and it lasts ye, good as new, forever."—*New York Sun*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Animals** — Cancellation of Registry. — Where, when one became a member of a stock-breeding association, there was a by-law as to tests for advanced registry and canceling certificates of advanced registry, such by-law was part of his contract of membership, and he became bound by it.—*Cabana v. Holstein-Friesian Ass'n of America*, N. Y., 188 N. Y. S. 277.

2. **Trespassing Stock**. — A mere agent in control of the cattle, horses, and mules belonging to his principal is not liable for damages done by such animals in trespassing upon the crops of another, under the principle that an agent is liable to no one except his principal for damages resulting from an omission or neglect of duty in respect to the business of the agency.—*Minor v. Dockery*, Miss., 88 So. 321.

3. **Attorney and Client** — Constructive Contract. — Where an insurance company refused to avail itself of the services of an attorney in exposing malfeasance by its president, whereupon the attorney presented the matter to the state superintendent of insurance, and procured the president's resignation, the law does not impose on an insurance company any constructive contract obligation to pay the attorney for his services in the matter.—*Caldwell v. Missouri State Life Ins. Co.*, Ark., 230 S. W. 567.

4. **Disrespectful Motion Papers**. — Attorneys who submit on motion for reargument motion papers that are impertinent and disrespectful to the court, will be censured and reprimanded, and will be required to pay personally the costs allowed on denial of the motion.—*Klein v. Smith*, N. Y., 188 N. Y. S. 272.

5. **Inexperience of Attorney**. — An attorney, improperly writing a letter to a lady, demanding on behalf of his client the return of a diamond engagement ring and other valuables, with a statement that the recipient of the letter was liable for prosecution, but, if she returned the property, no further proceedings would be taken, censured, but disciplinary proceeding dismissed by reason of his youth and inexperience.—*In re Penn*, N. Y., 188 N. Y. S. 193.

6. **Bailment—Burglary**. — In action for goods delivered to defendant by plaintiff, to be manufactured for plaintiff, but which were stolen while in defendant's possession, evidence as to a hole in the floor through which the burglars had entered defendant's premises from the cellar, held to rebut presumption that defendant was liable.—*Greenberg v. Mermelstein*, N. Y., 188 N. Y. S. 250.

7. **Return Shipment**. — Where plaintiff shipped goods to defendant company for cleaning and return, the fact that the shipment was by express was an intimation, if not an instruction, that it should be returned by a common carrier who would be responsible for nondelivery, and return by parcels post uninsured, was unauthorized, and the government in its post-office department did not become the agent of plaintiff to render defendant company not liable for loss of the shipment, it having assumed the risk by so shipping without insurance.—*Green v. Ben Vonde Co.*, N. C., 107 S. E. 139.

8. **Bankruptcy—Discretion of Court**. — Under Bankruptcy Act, § 70b (Comp. St., § 9654), requiring property of the bankrupt to be sold subject to the approval of the court when practicable, and not sold otherwise than subject to such approval for less than 75 per cent of its appraised value, the court had discretion to refuse to confirm a sale on the property at public auction, where the best bid was only 41½ per cent of the appraised value.—*Bryant v. Charles L. Stockhausen Co.*, U. S. C. C. A., 271 Fed. 921.

9. **Banks and Banking—Bill of Lading**. — When a bank gives unqualified credit for a draft attached to bill of lading, it becomes the owner thereof, and any funds collected thereon, and is not liable for any failure of the shipment to fulfill the terms of the contract between the seller and the purchaser, under U. S. Comp. St., § 8604.—*Farmers' State Bank of Kenefick v. A. F. Hardie & Co.*, Tex., 230 S. W. 524.

10. **Bill of Lading**. — Where a bank issued a letter of credit to honor drafts against bills of lading for certain bags of "Java white granulated sugar," the bill of lading attached to the ensuing draft, describing the sugar as "Java white sugar," did not comply with the terms of the letter of credit, and the bank was not obligated to honor such draft.—*Lamborn v. Lake Shore Banking & Trust Co.*, N. Y., 188 N. Y. S. 162.

11. **Knowledge of Account**. — A bank is charged with knowledge of the state of its customer's account on which a check is drawn when it makes an election whether to pay the check or not, and the fact that the account appeared to be good when actually it was not, is immaterial, so that a bank whose bookkeeper falsified an account on which checks were drawn is liable for the acts of its bookkeeper as against an innocent holder of the checks to whom the bank had paid the amounts they called for, and cannot recover such amounts from such holder on any theory that a trust should be declared in the bank's favor on the amounts.—*Liberty Trust Co. v. Haggerty*, N. J., 113 Atl. 596.

12. **Bills and Notes—Attorney's Fee**. — In an action on a note brought by trustee to whom it had been indorsed, where judgment went for plaintiff, it was proper to enter judgment for attorney's fees, despite defendant's contention that there was no evidence, either that the note had been placed in the hands of an attorney for collection, or that the amount allowed was reasonable.—*Gray v. Stolley*, Tex., 230 S. W. 866.

13. **Lack of Maturity Date**. — That note for amount to be paid as liquidated damages on maker's breach of contract bore no maturity date did not affect its validity, the date of maturity in such case being the date on which maker repudiated the contract, which date was to be ascertained by the evidence.—*Nesbitt v. Hudson*, Tex., 230 S. W. 747.

14. **Bribery—"Officer of the United States"**. — A baggage porter, employed by a railroad under the control of the United States government, was not an officer of the United States, within Criminal Code, § 39, making it an offense to bribe an officer to influence his action.—*Krichman v. United States*, U. S. S. C., 41 Sup. Ct. 514.

15. **Brokers—Commission.**—An oral understanding at the time of giving a broker a contract to sell land that the purchaser procured by him was already the owner's customer, and that the broker should not attempt to sell him will not prevent recovery of a commission, as the broker's contract in such case was required by the statute of frauds to be in writing, and made no exception as to the persons to be dealt with.—*Keith v. Peart*, Wash., 197 Pac. 928.

16. **Instant Ability to Purchase.**—Where defendant refused to sell land to a purchaser procured by plaintiff solely on the claim that plaintiff had no authority at that time to sell at a price previously fixed, it was not necessary to show, in an action for a commission, that the purchaser had on his person or instantly within reach the amount of cash required to make the purchase.—*Crow v. Casady*, Ia., 182 N. W. 884.

17. **Carriers of Goods—Care of Explosives.**—Compliance by a carrier with the regulations of the Interstate Commerce Commission in the transportation of explosives does not relieve it from its common-law duty to exercise such additional care as is required by the circumstances of the particular case.—*Lehigh Valley R. Co. v. Allied Machinery Co.*, U. S. C. C. A., 271 Fed. 900.

18. **Damage in Transit.**—Under the tariff regulations of a railroad company, providing that carload shipments arriving at its general New York terminal and there held for further directions, after a stated term, should be subject to demurrage charges, and the liability of the company therefor should be that of warehouseman only, where a car was so held, the liability of the company as carrier held to have reattached on its receipt of an order for forwarding the shipment.—*Lehigh Valley R. Co. v. John Lysaght, Limited*, U. S. C. C. A., 271 Fed. 906.

19. **Carriers of Passengers—Negligence.**—While a carrier's trainmen have no affirmative duty to ascertain physical condition of a passenger, making it necessary to render special assistance to her in debarking, where the condition is observed or is such that they in the exercise of ordinary care in the discharge of their duties are bound to observe that she requires such assistance, it is their duty to render it.—*Payne v. Thurston*, Ark., 230 S. W. 561.

20. **Negligence.**—Proof that a passenger fell from a train moving at a speed of 40 to 50 miles per hour, and that when he recovered consciousness he was in the hospital suffering from serious injuries, is sufficient to warrant finding his injuries resulted from the fall, without direct testimony to that effect.—*Olivieri v. Hines*, U. S. C. C. A., 271 Fed. 939.

21. **Chattel Mortgages—Conversion.**—Where vendor removed grain from land, his act in taking an elevator receipt in the name of himself and purchaser, who had been in possession, was such an admission of title in the purchaser as will carry to the jury an action of conversion by a third person claiming under a chattel mortgage given by the purchaser.—*First Nat. Bank v. Montana Emporium Co.*, Mont., 197 Pac. 994.

22. **Commerce—Interstate.**—A flagman, employed by a railway company which was engaged in both interstate and intrastate commerce, is employed in interstate commerce while engaged in flagging a train, regardless of whether that train was engaged in interstate or intrastate commerce, since his duties were essential to the safety of all trains and therefore his widow cannot recover compensation for his death under the Pennsylvania Workmen's Compensation Law.—*Philadelphia & R. Ry. Co. v. Di Donato*, U. S. S. C., 41 Sup. Ct. 516.

23. **Constitutional Law—Ratification of Amendment.**—The Eighteenth Amendment to the Constitution, which was to take effect one year after being ratified, became effective on Jan. 16, 1920, which was one year after the consummation of the ratification, though the Secretary of State did not proclaim the ratification until January 29, 1919.—*Dillon v. Gloss*, U. S. S. C., 41 Sup. Ct. 510.

24. **Corporations—Authority of Employee.**—Letters signed in the name of a corporation by one denominated as field manager are evidence of his authority if in response to communications

sent to it.—*W. T. Rawleigh Medical Co. v. Woodward*, Mo., 230 S. W. 647.

25. **Foreign Corporations.**—Where defendant corporations were not authorized to and never had in fact transacted any business in this state, service on their officers temporarily in this state on business of their own was abortive.—*Appgar v. Altonna Glass Co.*, N. J., 113 Atl. 593.

26. **Promoter's Contract.**—A promoter's contract to sell stock in consideration of stock to the amount of 10 per cent of the sale price of the stock sold was not binding on the corporation promoted on the theory of ratification, as the corporation itself would not be authorized to make such a contract under Const. art. 15, § 10, Rev. Codes, § 3894, as amended by Laws 1917, c. 89, forbidding issue of stock except for labor done, etc., and §§ 3853, 3854, and a ratification is not valid under § 5427, unless at the time of ratifying the principal has power to confer authority for such an act, and, under § 5428, an unauthorized act cannot be made valid, retroactively, to the prejudice of third persons, without their consent.—*Kirkup v. Anaconda Amusement Co.*, Mont., 197 Pac. 1005.

27. **Tort of Former Partnership.**—An action in tort cannot be maintained against a corporation on the ground that it afterwards purchased the assets and assumed the liabilities of a partnership which had committed the tort complained of, although the stock of the corporation is owned by the members of the former partnership.—*Martin v. Cupeper Supply Co.*, W. Va., 107 S. E. 183.

28. **Easements—Obstructions in Way.**—Although such road or right-of-way runs partly through other land of the dominant owner, his subsequent purchase of the land constituting the dominant estate, and the vesting of the lesser in the greater estate covering that part of the way, will not extinguish his rights in the other portions of the way and deprive him of his use thereof.—*McNeil v. Kennedy*, W. Va., 107 S. E. 203.

29. **Eminent Domain—Market Value.**—There is no fixed rule of law whereby the market value of property condemned for public purposes is to be determined by capitalizing the rent reserved in a lease thereof, or what experts consider the reasonable rental value, and there is no fixed rule with respect to the percentage on which such capitalization should be made, nor is it the rule conversely that the fair rental value, to determine the value of a leasehold, may be obtained by assuming that the rental should return a certain percentage on the value of the property.—*In re Seventh Ave. and Varick St.*, N. Y., 188 N. Y. S. 197.

30. **Electricity—Degree of Care.**—A company generating and distributing electricity is bound to exercise the utmost care to see that it does not escape and do injury to those who have a right to be where they are, and who in the performance of their duty might reasonably be expected to be injuriously affected by the current escaping because of the wire coming in contact with other harmless wires in close proximity.—*Weddle v. Tarkio Electric & Water Co.*, Mo., 230 S. W. 386.

31. **Rates.**—Under Public Service Commission Law, §§ 71-74, the mere fact that the city of New York, under § 66, subd. 12, had the right to complain, in the general interest of the public, of rates for electric current charged by two generating companies, did not give it the right to come into court in an action brought solely against the companies until it had first exhausted its remedies by complying with § 71 in lodging its complaint with the Public Service Commission, fully empowered to grant relief in proper case.—*City of New York v. New York Edison Co.*, N. Y., 188 N. Y. S. 262.

32. **Exchange of Property—Rescission.**—If defendants induced plaintiff to trade horses by warranting their horse to be sound; when in fact he was not sound and by falsely representing the soundness of their horse with intent to deceive plaintiff, and if representations were not mere traders' talk, the plaintiff was entitled to rescind the trade by tendering back to the defendants their horse, and on defendants' refusal to rescind, plaintiff could bring an action

in detinue and for conversion of his horse.—*Ingram & Co. v. Eason, Ala.*, 88 So. 339.

33. **Frauds, Statute of—Verbal Lease.**—A lessee, who has entered into possession of land under a verbal lease which was not to be performed within one year and has completed the contract, is liable for the rent; and when a lessor has exercised a contractual right to terminate a verbal lease at the end of a yearly period, this constitutes the lease a completed contract, and the mere failure to discharge mutual monetary obligations on a verbal contract otherwise completed does not render such contract unenforceable under the statute of frauds.—*Frunkling v. Berry, Miss.*, 88 So. 331.

34. **Fraudulent Conveyances—Bulk Sales.**—The sale of restaurant fixtures such as tables, chairs, counters, ice boxes, etc., held not within the Bulk Sales Law.—*Gallup v. Rhodes, Mo.*, 230 S. W. 664.

35. **Injunction—Filing of Petition.**—Code, § 4359, providing that no temporary writ of injunction shall be allowed by any judge during term time except the petition therefor be first filed with the clerk and entered on the court calendar, is directory and not mandatory, so that where a petition for injunction was presented to the judge during term time, and the order allowing the temporary injunction was granted without the petition being first filed and entered on the court calendar, the injunction will not be dissolved for such reason.—*Denison v. Brotherhood of American Yeomen, Ia.*, 182 N. W. 873.

36. **Insurance—Burden of Proof.**—In an action on a certificate issued by fraternal insurer, where the deceased member, a private in the army, while on a transport, died from two bullet wounds just above the heart, a finding that death was not the result of suicide or intentional self-destruction, held warranted, in view of the presumption of love of life and the fact that either of the wounds would have proven instantly fatal.—*Bear v. Sovereign Camp, W. O. W., Mo.*, 230 S. W. 369.

37. **Change of Occupation.**—A fraternal order's local clerk, through whom only the member might communicate with the ruling officials, and who was required to report the standing of members, was the agent of the order, and a member's duty under the laws of the order to give notice of engagement in a hazardous occupation was complied with by giving notice to such clerk, and where notice was given and no notice of any increase of assessment was ever given, the order was estopped to deny payment of the proper dues, though, as authorized by *Crawford & Moses' Dig.* § 6095, the laws of the order provided that no officer or agent could waive the provisions of the laws.—*Sovereign Camp, W. O. W. v. Key, Ark.*, 230 S. W. 576.

38. **Fraudulent Representations.**—Where insured in his application to a fraternal insurance society stated that he had never been advised to change his residence on account of health, had never had a number of specific diseases, and had not consulted a physician since childhood, the fact that insured, who was passed by defendant's examiner as a first-class risk, was rejected very shortly after by the examiner for another insurance company, does not establish that his representations were fraudulent.—*Supreme Tribe of Ben Hur v. York, Colo.*, 197 Pac. 1012.

39. **Military Service.**—An insurance company or benefit society has the right to select the particular risks it is willing to assume, and there is no public policy against a contract exempting insurance company in advance from liability for the death of insured while in the military or naval service of the government, either voluntary or involuntary.—*Marks v. Supreme Tribe of Ben Hur, Ky.*, 230 S. W. 540.

40. **Subrogation.**—An insurer of a steamer's cargo, which paid the damage to the shipper after the sinking of the steamer, and took an assignment of the shipper's cause of action, was thereby subrogated to the shipper's right of action against the ship and its owner.—*The Viking, U. S. C. C. A.*, 271 Fed. 801.

41. **Intoxicating Liquors—State Statute.**—The fact that the state statute imposes penalties for

the illegal sale of intoxicating liquor which are different from those in the Volstead Act does not make the state statute void.—*People v. Cook, N. Y.*, 188 N. Y. S. 291.

42. **Sufficient Indictment.**—In prosecution for violation of prohibition law, indictment that defendant sold and had in his possession "prohibited liquors or beverages" held sufficient, as against contention that the liquors were not alleged to have been alcoholic or malt, or some device or substitute therefor.—*Roberson v. State, Ala.*, 88 So. 355.

43. **Landlord and Tenant—Renewal of Lease.**—Where there are two tenants, in order that they may make a new contract by exercising an option to renew, it must be done by their united action, either by giving oral or written notice, or by jointly holding over and thus raising the implication that they have made such election.—*Foster v. Stewart, N. Y.*, 188 N. Y. S. 151.

44. **Licenses—Peddlers.**—Where employe of foreign corporation engaged in the sale of tea and other merchandise to the retail trade, with no distributing point in the state, divided the city into twelve routes, visited each customer on each route every two weeks and solicited orders for future delivery, sent orders to nearest distributing point, and delivered merchandise and made collection upon receipt of goods from such distributing point, the corporation was not required to pay a license tax for doing business as a peddler with a one-horse wagon.—*City of Anniston v. Jewel Tea Co., Ala.*, 88 So. 351.

45. **Malicious Mischief—Depositing of Dead Animals.**—"Malicious mischief" is any malicious or mischievous injury either to the rights of another or the public in general, and is done in a spirit of wanton cruelty or black and diabolical revenge; and hence the depositing of rotten eggs or dead animals in another's well constitutes malicious mischief at common law.—*Johnson v. State, Ala.*, 88 So. 348.

46. **Master and Servant—Casual Employment.**—One who volunteered to make repairs in a saloon which proved to be a job for a plumber is in an employment both casual and not in the course of his employer's business, so as to be excepted from the Workmen's Compensation Act of 1917 by § 8a thereof.—*Roberts v. Industrial Accident Commission, Cal.*, 197 Pac. 978.

47. **Conclusive Settlement.**—An employer cannot repudiate an agreed settlement with a claimant for compensation, in reliance on which the claimant had dismissed her petition for compensation and had taken out letters of administration on her husband's estate, on the ground that the settlement was entered into by the employer without a full knowledge of the facts.—*Kuhn v. Pennsylvania R. Co., Pa.*, 113 Atl. 672.

48. **Course of Employment.**—Where, in a dispute concerning the damages to a shipment, plaintiff accused the express driver of lying, and, on the following day, after the damages had been satisfactorily adjusted, the driver armed himself without his employer's knowledge and on return to plaintiff's place of business to obtain a receipt and payment of the express charges, demanded an apology from plaintiff's husband and in connection therewith shot him, the demand for an apology was no part of his employment, and the express company was not liable.—*American Ry. Express Co. v. Mackley, Ark.*, 230 S. W. 598.

49. **Death from Cerebral Hemorrhage Compensable.**—Death of an employe, suffering a cerebral hemorrhage while moving a flat car into position in a gravel pit, on a hot day, held compensable; it appearing that the day was one of the hottest of the year and that the radiation from the sand intensified the heat to an unusual degree, and that there was no breeze.—*Murray v. H. P. Cummings Const. Co., N. Y.*, 188 N. Y. S. 193.

50. **Speed of Train.**—The engineer of a passenger train going 25 to 30 miles an hour and visible for two miles while approaching a siding occupied by a waiting freight train, with signals indicating clear track, is not bound to anticipate that members of the freight crew will be on the track so as to impose on him the duty to reduce his speed, but he has the right to expect that

they will be in a position of safety and use reasonable diligence in taking such positions.—*Sorrell v. Missouri, K. & T. Ry. Co.*, Tex., 230 S. W. 768.

51. **Mines and Minerals.—Reservation.**—Under the settled law of West Virginia that the word "mineral" is not capable of a definition of universal application, but is susceptible of limitation according to the intention of the parties using it to be ascertained from the language of the deed, the relative position of the parties, and the nature of the transaction, where a controversy over the title to land was settled by a conveyance of the land by one party to the other, who was in occupancy of the surface, with a reservation of "all the minerals, mineral substances, and oils of every sort and description," with the right to mine, bore wells, and use so much of the surface as required in operating mines or wells, the reservation held to include natural gas.—*Dingess v. Huntington Development & Gas Co.*, U. S. C. C. A., 271 Fed. 864.

52. **Monopolies.—Fixing Prices.**—An attempt by the manufacturer of a patented article, by means of a system of so-called license contracts, which wholesale and retail dealers were required to sign, to control the resale price of such article, after it had sold and received payment for the same, and after such article, under the law as settled by prior decisions of the Supreme Court, by reason of such sales, had been freed from the patent monopoly, held an unlawful restraint of trade, in violation of Anti-Trust Act, § 1.—*Victor Talking Mach. Co. v. Kemeny*, U. S. C. C. A., 271 Fed. 810.

53. **Municipal Corporations.—Negligence.**—A property owner is not estopped from recovering from defendant city damages suffered by him by reason of the city's negligence in making a paving improvement whereby surface water was collected in front of the owner's lot because he petitioned the city with others for the improvement; the petition not being construable as a request to make the improvement without reference to consequences to plaintiff resulting from negligence.—*City of Greenville v. McAfee*, Tex., 230 S. W. 752.

54. **Negligence.—Slippery Platform.**—In an action against a lessee of a store by a customer, who slipped upon a concrete platform at the entrance as she was leaving on a rainy day, held, that there was no evidence to show that defendant was guilty of negligence, where it was not shown that he constructed the platform, or that there had been accidents of a similar kind on other rainy days, due to the slipperiness of the surface, or that slipping was due to the wet condition of the platform or its improper construction.—*Schaefer v. De Neergaard*, N. Y., 188 N. Y. S. 159.

55. **Physicians and Surgeons.—Negligence.**—It is incumbent on a physician to give such instructions as are proper and necessary to enable the patient or his nurses and attendants to act intelligently in the treatment of the case, and a failure to do so is negligence, which will render him liable for injury resulting therefrom.—*Everts v. Worrell*, Utah, 197 Pac. 1043.

56. **Principal and Agent.—"Contract of Sale."**—An order for merchandise, given by plaintiff and signed by one as salesman for defendant, held not to constitute a "contract of sale."—*C. F. Bally, Limited v. Quaker City Corporation*, U. S. D. C., 271 Fed. 957.

57. **Railroads.—Excessive Charges.**—Under Federal Control Act, § 10, allowing actions at law against carriers without defense that the carrier is an instrumentality of the federal government, an action to enforce an order by the Interstate Commerce Commission, requiring the carrier to repay to the shipper excessive charges collected before the government took control, can be maintained against the company during the period of government control.—*Vicksburg, S. & P. Ry. Co. v. Anderson-Tully Co.*, U. S. S. C., 41 Sup. Ct. 524.

58. **Sales.—Breach of Warranty.**—Where a contract of sale contains a warranty and provision for a remedy in case of breach, that remedy is exclusive.—*J. I. Case Threshing Mach. Co. v. Rose*, Ky., 230 S. W. 545.

59. **Measure of Damages.**—Where buyer's failure to accept all ties conforming to speci-

cations on seller's delivery of 211,000 feet, and loss of a portion of the ties delivered was the result of confusion caused by seller's delivery of large numbers of ties not conforming to specifications, and seller's noncompliance with provision of contract, requiring delivery with the different grades and dimensions of ties segregated, and stevedores' refusal to handle all of the ties because of such confusion, the fact that some of the ties sent back complied with specifications of the contract, and that some of the ties were lost, did not excuse the seller's failure to make further deliveries.—*Stimson Mill Co. v. Rogers, Myrois Lumber Co.*, Wash., 197 Pac. 919.

60. **Taxation.—Bequest to City.**—A bequest to the city of Duluth, in trust "for the establishment of a free and public hospital," is exempt from the transfer tax; such city being empowered by its charter to receive gifts for such purposes.—*In re Miller's Estate*, N. Y., 188 N. Y. S. 320.

61. **Increased Value of Stock.**—Where the owner of corporate stock in good faith made gift thereof, and the stock had considerably enhanced in value between the first of the year and the date of the gift, the owner is not liable to taxation under the Income Tax Law on account of the increase, for it was of no pecuniary benefit to him.—*People v. Wendell*, N. Y., 188 N. Y. S. 273.

62. **Movable Property.**—Sulphur, which had been removed from underground in a liquid state and allowed to solidify, is not part of the realty, but was properly assessed as movable property, though it was in such large blocks it would have to be blasted before it was loaded for shipment.—*Union Sulphur Co. v. Reid*, U. S. D. C., 271 Fed. 978.

63. **Tender.—Actual Production Unnecessary.**—One tendering money did not have to produce actually the money where there was a refusal to accept the amount offered, which was admitted on the trial.—*Murray v. Bryan*, N. Y., 188 N. Y. S. 254.

64. **Trusts.—Money on Deposit.**—Money deposit payable to mother or daughter, or survivor, held not a trust for mother to daughter for benefit of all the children.—*Kauffman v. Edwards*, N. J., 113 Atl. 598.

65. **Wills.—Contradictory Provisions.**—Under a will: "I give and bequeath to my wife . . . all my personal estate her lifetime or widowhood, at her death or marriage I bequeath to my niece all my estate, both real and personal. . . . I also bequeath to my wife all my real estate, if any there be, at my death"—held, that wife took only life estate in the real estate, and that the niece on the death of the wife took an absolute fee simple estate.—*Carey v. Dykes*, Md., 113 Atl. 626.

66. **Duty of Witnesses.**—The word "attested," used in § 5078, Code of 1906, is broader in meaning than "subscribed," and the purpose of the statute in requiring two witnesses to attest the will is to have more than the mere signatures to the will. It is the duty of the attesting witnesses under the statute to observe and see that the will was executed by the testator; and to observe his capacity to make a will; and where the testator did not sign the will in the presence of one of the witnesses, nor declare his signature, nor identify the paper or signature, nor declare it to be his will, it was improper to instruct the jury that the will was duly and legally executed.—*Maxwell v. Lake*, Miss., 88 So. 326.

67. **"Heirs."**—The word "heirs" within provision of will directing that on son's death "without heirs him surviving" the property bequeathed to the son should become the property of named daughter, held to mean children, not heirs generally, in view of the fact that the ultimate taker, as the son's sister, was his presumptive heir.—*Hines v. Reynolds*, N. C., 107 S. E. 144.

68. **Witnesses.—Privileged Communications.**—An attorney cannot be required to testify concerning communications made to him in that capacity, notwithstanding no objection is made by the client, who, not being a party to the litigation or present at the trial, has no opportunity to consent or to object to the testimony.—*O'Brien v. New England Mut. Life Ins. Co.*, Kan., 197 Pac. 1100.

Central Law Journal.

St. Louis, Mo., September 2, 1921.

WHEN A SUBSCRIPTION TO A CHARITABLE ENTERPRISE IS ENFORCEABLE.

The recent case of *Scott v. Triggs*, 131 N. E. 415 (Ind.) raises the question whether a subscription to a charity is enforceable. It held that such a subscription is enforceable if relied upon by those in charge of the fund to which the subscription is made.

In that case defendant signed a subscription to the Huntington County (Ind.) War Chest, a fund collected by the citizens of Huntington County, Ind., to be distributed to the various war charities in discharge of the quotas for which the county was morally obligated as a community. Defendant failed to pay his subscription and the court gave judgment against him on the ground that "the association, relying on the pledge so made by the appellant and on the pledges made by others, incurred various expenses and obligations for the purpose of carrying out the objects of the association, which obligations have not all been paid by the association, but that a portion of said obligations are now due and owing."

So long as a consideration is necessary to sustain a contract under the English common law, a subscription can never be regarded as anything but an offer. This result shows the absurdity of the common law rule requiring a consideration to support a promise, and in this case as in many other cases the courts have been diligent to find ways of escape from such an unjust condition. In every system of jurisprudence on the continent of Europe, a promise is good irrespective of the fact that the promisor reaps a benefit or the promisee suffers a detriment. And this is true in English law in the case of specialties. As Dean Ames, of Harvard, has pointed out, a sealed instrument was valid without a consideration, not because the seal im-

ported a consideration, but simply because a promise attested by one's seal created an obligation based on such promise. A written contract today is, in most states where seals have been abolished, as solemn a proceeding as the execution of a sealed instrument at the early common law, and any man who solemnly binds himself to pay a sum of money or perform an act ought not to escape performance by showing lack of consideration. If his promise requires the performance of an act by the other party or the prior or continued existence of some article or status, such requirements should more properly be regarded as conditions, either precedent or subsequent as the case may be.

In the case of a subscription to a charitable enterprise, the promisor engages to pay a sum of money on a date certain in aid of a particular purpose. The fact that others are interested in the same enterprise and that one subscription is made on the faith of another, is hardly a consideration for the promise of any one subscriber. It might possibly be a condition express or implied. I might agree to contribute \$200 provided a sum of \$10,000 is raised by similar subscriptions. In such case no subscription would be binding until subscriptions amounting to \$10,000 had been received at which moment all subscriptions would become binding.

Where no conditions are attached to the subscriptions they become binding under the common law just like other offers to induce the performance of an act, namely, by the performance of the act.

It is almost impossible to draw up a subscription contract that will be binding until the promisee starts upon the performance of the task for the accomplishment of which the subscription was made. Until that moment the contract is unilateral and unenforceable. *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; *Philips Limerick Academy v. Davis*, 11 Mass. 113, 6 Am. Dec. 162; *Johnson v. Otterbein University*, 41 Ohio State. 527.

Logically, the act called for by a unilateral promise should be completed before the promisor is bound, but in the case of subscriptions it is generally held that if work has been done or money expended in reliance upon the subscription being paid, such entry upon performance constitutes an acceptance of the contract and furnishes the consideration to make the subscription a binding obligation.

The objection is made to this rule that it is theoretically fallacious in the reasoning on which it is based. If I agree to give A one dollar if he will cut the grass on my lawn, A is not entitled to the compensation until he has cut over the grass on the entire lawn. A few strokes of the sickle would not entitle him to bring suit for the dollar which I promised him. But the case of a subscription is different. The money I promise is not compensation to the promisee for services to be rendered but is the *instrument* by which such services are rendered. So when the promisees have bound themselves to carry out the object of the subscription contract, the promisor is bound at once to supply the promisee with the means of carrying into execution the act called for by the subscriber's promise.

The courts have reached a right result simply by acting on their sense of justice, so the Supreme Court of Ohio admitted in the case of *Irwin v. Lombard University*, 56 Oh. St. 9, 22, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239. In that case the court felt compelled to admit that "it is not unlikely that some of the cases in which subscriptions have been enforced at law, have been border cases, distinguished by slight circumstances from agreements held void for a want of consideration."

The confusion into which some of the courts have fallen, is due to the fact that they have regarded the subscriber's promise as an offer to pay for the accomplishment of a charitable purpose, when clearly the promise is to furnish the means for the performance of an act, desired by the promisor. The offer in such cases is virtually

this: "If you will undertake to build a church or a school, etc., I will give you \$200 to enable you to complete the enterprise." Here the act called for is not the completion of the enterprise but the assumption of an obligation to complete it. When the promisees assume obligations to perform the task called for, they have performed the act required by the promisor who is now bound to furnish the means to carry on the task he desired the promisees to undertake.

NOTES OF IMPORTANT DECISIONS

LIABILITY OF BANK FOR WRONGDOING OF DEPOSITOR'S AGENT WHERE PASS-BOOK BALANCE IS CHECKED BY SAID AGENT.—Some courts have applied too strictly the rule of estoppel arising in favor of a bank with respect to a depositor's examination of the periodical statements furnished by the bank, where such statement is checked by the agent of the depositor.

It is undoubtedly true that knowledge of a dishonest agent of fraudulent entries and incorrect balance is equally the knowledge of his principal, with the qualification, however, that the principal is chargeable, not with the knowledge of wrongdoing the agent possessed from the fact that he himself was dishonest, but with knowledge of such facts as an honest agent, unaware of the wrongdoing, would acquire when examining the statements within the scope of his employment. The dishonesty of the agent does not change his relationship to his principal, and accordingly does not change the rule charging his principal with knowledge of such facts. *Dana v. National Bank of Republic*, 132 Mass. 156; *First National Bank v. Allen*, 100 Ala. 476, 40 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80; *Critten v. Chemical National Bank*, 171 N. Y. 219, 63 N. E. 973, 57 L. R. A. 529; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811.

But this rule does not apply to instances of wrongdoing on the part of the agent which are distinctly contrary to the agent's powers where the authority of such agent is filed in writing with the bank. *First National Bank v. Farrell*, 272 Fed. Rep. 371. In this case Farrell, the plaintiff, opened an account with the First National Bank of Philadelphia and authorized the bank to honor the checks of his agent, Snyder, up to an amount not in excess of one thousand

dollars. He also authorized the agent to check and accept the bank's periodical statements. The agent drew and cashed many checks for his own use in amounts in excess of one thousand dollars before his rascality was discovered. This suit is brought to recover from the bank the amounts in excess of \$1,000 which plaintiff's agent drew upon and cashed at defendant's bank. To the contention of the defendant that plaintiff was bound by the periodical statements submitted by his request to his agent, the Circuit Court of Appeals (3rd Cir.) said.

"The general rule arising from the examination of pass book or statements by the depositor himself, and the variation of the rule arising from the examination of them by his authorized agent, involve in practically every reported instance wrongdoing where the negligence of the bank was not involved and where the wrongful act was entirely that of a person other than the bank. Both the rule and its variations disappear altogether where the bank has been negligent in detecting the fraud; *National Dredging Co. v. Farmers' Bank*, 6 Pennewill (Del.) 580, 69 Atl. 607, 16 L. R. A. (N. S.) 593, 130 Am. St. Rep. 158; *Manufacturers' National Bank v. Barnes*, 65 Ill. 69, 72, 16 Am. Rep. 576; *Myers v. Southwestern National Bank*, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672; when the neglect of the bank to observe the limitation of a drawing power was, as here, the primary and proximate cause of the loss; and particularly where, as here, the wrongful act (in the sense of conduct beyond the scope of its authority) was the act of the bank itself, but for which the criminal act of the trusted agent could not have been carried into execution. In honoring checks beyond the authority granted it by the depositors' power of attorney—a document in its possession—the bank in this case knew, or was charged with knowledge of, its own unlawful conduct. The depositors' failure personally to examine the periodical statements and promptly to acquaint the bank with its own wrongdoing misled the bank in nothing. Therefore the law did not impose upon depositors in this case the duty to check up a pass book or examine monthly statements to prevent the defendant bank from continuing its own wrongful conduct."

A GOVERNOR CANNOT BE LAWFULLY ARRESTED OR PUT UPON TRIAL WHILE IN OFFICE.

A Governor cannot be arrested and put upon trial for a supposed criminal offense, whether committed before or after he took office, without an encroachment of the Judiciary upon the Executive Department. We adhere to our position that this principle is well settled upon the principle and by

authority, notwithstanding the criticism and comment of Professor Henry W. Ballantine, published in the *CENTRAL LAW JOURNAL* of August 19, 1921. His comments prove the slight investigation he has made of the authorities and the unsoundness of his position. The drift of his comment is characterized by Professor Burgess of Columbia University, a distinguished authority on Political Science and Constitutional Law, in volume 2, page 245, in these words:

"Democratic doctrinaires have tried to make it appear that such privileges can only spring from the monarchic principle that the 'King can do no wrong'; *but their argumentation is a tissue of sophistry*. All states have found it necessary to recognize the complete personal independence of the executive head of the government, and some of them have founded it upon the doctrine that the 'King can do no wrong.' But there is another and deeper principle than that of the immaculate character of the king, upon which both the monarchic doctrine and the republican doctrine of the executive independence rest, viz: the necessary order of authority in every political organization."

It is admitted by Professor Ballantine that no Court can enjoin the Governor or mandate him, or prohibit him with respect to the performance of executive duties. That admission is a practical concession of the soundness of our position. The Constitution of Illinois vests in the Governor supreme executive power. It commands him to "take care that the laws be faithfully executed," and requires him to take an oath to support the Constitution. He is, therefore, vested with the duty of determining when the powers of the executive office are about to be invaded by the action of the Judiciary and he alone is authorized to determine that question.

In the case of *People v. Bissell*,¹ the Supreme Court of Illinois disclaimed the right to directly determine the limits of executive power and authority which may not be passed by the Judiciary and held that the Judiciary can only determine that question when it arises in suits to which the Governor is not a party, and said:

"When final action upon any subject is confided to either of the other departments, there the responsibility must rest of conforming such action to the law and the constitution." (The People ex. rel. v. Bissell, 19 Ill. 231; People v. Dunne, 258 Ill. 449. See also ex parte Moore, 64 N. C. 802; Ex parte Kerr, 64 N. C. 816; State v. Shields, 272 Mo. 342.)

Governor Small, upon full investigation and the advice of counsel, has determined that he would violate the provisions of the Constitution requiring him to take care that the law be faithfully executed and to uphold the constitution, if he should consent to his arrest and incarceration, or to being placed upon trial upon a criminal charge for the reason that such procedure would obviously suspend the operation of executive government, which he alone can personally function. This makes it his duty to oppose the effort of the courts to encroach upon his department. Therefore, if a Court can determine otherwise and coerce him to observe its process that would, as said by the Supreme Court of Missouri," make the judges the interpreters of the will of the executive and the independence of the executive department as a co-ordinate branch of government would be virtually destroyed."²

Professor Ballantine cites the case of Ekern v. McGovern,³ and quotes therefrom in support of his position. That case holds, contrary to the weight of authority and the decisions of the Supreme Court of Illinois, that a Governor is subject to the process of the courts to coerce or restrain him in the performance of an official duty.⁴

In the case of People v. Dunne, Justice Cartwright, construing the constitution and speaking for the court, said:

"By section 6 of article 5, the supreme executive power of the government is vested in the Governor. In the great majority

of jurisdictions it is held that in view of the division of the powers of government, there is no power on the part of the courts to enforce by *mandamus* the performance of any duty, whether discretionary or ministerial, imposed upon the chief executive by virtue of his office. (26 Cyc. 230; 6 Am. & Eng. Ency. of Law, — 2d ed., — 1017.) All authorities class this state with the majority as holding that doctrine. The independence of the judicial department and its freedom from interference by the other departments has been maintained. (Rockhold v. Canton Masonic Mutual Benevolent Society, 129 Ill. 440; In re Day, 181 id. 73; Witter v. Cook County Commrs., 256 id. 616.) Of course, it would be expected that the court enforcing the provision of the constitution by which the powers of government are partitioned among the several departments, for its own protection from interference would accord the same degree of independence to the other departments. We shall see with what scrupulous care this has been done."

Reference to the classifications of authorities in Cyc. and Am. & Eng. Ency. of Law will disclose that the Supreme Court of Wisconsin is with the minority on this question and that its decision is in direct conflict with that of the Supreme Court of Illinois. Moreover, the fallacy of its position is shown by the quotation in Professor Ballantine's comments. Referring to the possibility of executive resistance to the process of the court, it is said:

"This court has never yet acknowledged the existence of either the want of power to enforce its writs, or want of courage to vindicate it."

This is high sounding phrase, but its fallacy exists in the fact that the Governor is a chief executive, bound by oath of office to take care that the law be faithfully executed and to support the constitution of the state. Should the Court coerce him against his judgment and will in a matter relating to the performance of his duties under the constitution or law, as it so boastfully threatened, it would plainly substitute the judgment and will of the supreme judiciary for that of the supreme executive department contrary to the express commitment of au-

(1) 19 Ill. 231.

(2) State v. Shields, 272 Mo. 342; State v. Fletcher, 39 Mo. 508.

(3) 142 N. W. 595, 46 L. R. A. (N. S.) 795.

(4) People v. Dunne, 258 Ill. 441.

thority by the constitution and destroy and overthrow the executive department.

The Court was equally in error in holding that any construction of the constitution by the Governor not in harmony with that of the Court would be a violation of the law. What right has the court under a constitution to construe the constitution for its Governor and require him to accept its will? It was further said:

"The military would be in duty bound to disregard the illegal command of the Governor, if he should order them to use physical force against the sheriff."

This was an invitation to the militia to construe the constitution and determine whether an order of its commander-in-chief was lawful, and, in effect, invited insubordination of the militia when called upon to execute the law in accordance with the judgment and will of the executive. It requires no legal acumen to see that such a principle would be destructive of republican government and it can have no support from any person who prefers orderly government to anarchy.

The direct statement that a Governor, the supreme executive, has no authority to restrain the sheriff, an inferior of his department, from doing what in his judgment is in violation of the constitution is a fallacy too patent for acceptance by any unbiased mind in the habit of considering legal questions, and it is equally clear that that was not a question within the jurisdiction of the courts of Wisconsin.

It is further said:

"As commander of the militia, he (the Governor) has no right to use the military force of the state to defy the officers of the law. The military would be in duty bound to disregard the illegal command of the Governor if he should order them to use physical force against the sheriff."

This position places the Supreme Court of Wisconsin in the strange attitude not only of assuming that the Governor could not exercise honest judgment in conflict with the views of the Court, but also arrogates to the Court the exclusive right to deter-

mine what are and what are not lawful duties of the Governor under the constitution, contrary to all other authorities on that subject, and to determine for the Governor when he may or may not use the militia in protection of executive authority, although every other court that has spoken on that subject has held that when the Governor acts as commander-in-chief of the militia, his action cannot be questioned by any authority or in any place.⁵

The language, "No man in the country is so high that he is above the law, no officer of the law may set the law at defiance with impunity," quoted from *United States v. Lee*,⁶ is not in conflict with the views of Governor Small's counsel, nor the weight of authority. We have never contended that he has, nor does he claim, a *personal exemption* from arrest and trial for a supposed criminal offense committed either while in office or before he took office, but that to arrest him and put him upon trial while in office would be to practically, either temporarily or permanently, depose the Chief Executive, cause a suspension of executive functions and thereby inevitably encroach upon the executive department. We insist this is true, both as a matter of fact and as a principle of law. It results from the impossibility of separating the person of a Governor from the office in which he functions. So long as he holds the office it is ever with him. As President Jefferson said in the Burr case, in declining to obey a subpoena sent to him by Chief Justice John Marshall: "To comply with such calls would leave the Nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary that it is the only branch which the Constitution requires to be always in function."

It is true, as advanced by Professor Balantine, that section 3, article 7 of the Constitution of Illinois, exempts from arrest electors during their attendance upon elec-

(5) *Ex parte Moore*, 64 N. C. 302; *Ex parte Kerr*, 64 N. C. 816.

(6) 106 U. S. 196.

tions and in going to and returning from the same, except for treason, felony or breach of the peace. And, it is also true that a like exemption exists in favor of senators and representatives during the sessions of the General Assembly, and in going to and returning from the same. But that does not argue that the absence of a like provision in relation to the Governor supplies a basis for the contention that he has no such exemption.

The Governor is a branch of the legislative department. It is his duty to pass upon all legislative bills and either approve or disapprove of them. Would Professor Ballantine have us believe that the framers of our constitution thought it necessary to provide such immunity for the senators and representatives and proper to leave it in the power of the courts at will to take the Governor from the performance of much more important legislative duties than can possibly devolve upon them when he is passing upon the acts of a legislative session? Would that not be a strange inconsistency to be found in so important a document as a State Constitution? Is not the absence of a constitutional provision privileging the Governor from arrest clear demonstration that the framers of the constitution understood that he would not at any time be subject to arrest without such express exemption?

A very large number of cases have arisen in which this question has been incidentally discussed, but we are not aware that it has ever before directly arisen in any court of this country. The principle for which we contend seems to have always been conceded upon fundamental principles deduced from the nature of the office and the evident impossibility of separating the person of a chief executive from the chief executive function.

In a case where the acts of the President of the United States as Commander-in-Chief of the Army were questioned by a suit against him, quoting from Chief Justice Marshall in an earlier case, Chief Justice

Chase of the Supreme Court of the United States, aptly described a similar contention as that of Professor Ballantine as "an absurd and excessive extravagance," and said:

"It was admitted on the argument that the application now made to us is without precedent; and this is of much weight against it. Had it been supposed at the bar that this court would in any case interpose by injunction to prevent the execution of an unconstitutional act of congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it. * * * The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained."

In the case of *State v. Holden*,⁶ in which it was sought to have a bench warrant issued for the arrest of the Governor and prosecute him for an alleged criminal act committed while acting as commander-in-chief of the militia, it was said:

"The learned counsel were unable to show any precedent which would sustain application of affiant and this fact goes far in showing no such judicial power exists."

So, that there are no decided cases where this question has been directly involved argues that the courts have heretofore declined to attempt to coerce a Chief Executive rather than that no such case has arisen, or that the law is contrary to the opinion expressed by Governor Small's counsel. Where, nevertheless, the question has arisen, it has been uniformly held that the Governor cannot be arrested or coerced by judicial process; and the exemption has been put upon the broad ground that the person of the Chief Executive and his office are so inseparable that his personal liberty cannot be restricted or his right to go where he will and do what he will impaired without also encroaching upon the executive office, and destroying its free and independent exercise by the Governor.

If arrested, the Governor might be put in jail, and if put upon trial he would be com-

(7) *Mississippi v. Johnson*, (U. S.) 4 Wall. 475-502.

(8) 64 N. C. 829.

pelled to remain personally in court during his trial, though it might consume months. If subject to arrest and trial for an offense alleged to have been committed before he took office, he may also be arrested and put upon trial for an offense alleged to have been committed while in office—even for an alleged malfeasance or misfeasance in office or palpable omission of any duty of office,⁹ for the section of the Constitution in relation to a judgment of impeachment only removes the officer impeached from office and disqualifies him to thereafter hold office, and provides:

"The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment and punishment according to law."

If he can be thus prosecuted during his term of office for treason or felony, he may be put upon trial for the most insignificant misdemeanor, at the will of the most insignificant and irresponsible court. If he can be prosecuted on a criminal charge at all, he would have no right to choose the time of his arrest or trial, hence his arrest or trial might suspend or defeat performance of the most important public duties that may devolve upon a Governor. These vital facts and fundamental principles are ignored by the doctrinaires followed by Professor Ballantine, but cannot be ignored with hope of reaching a correct conclusion.

The authorities are conclusive in support of the opinion given to Governor Small. In every case where the question of coercing or arresting a Governor has been considered, it has been held that his office is immune from interference and that he cannot be personally arrested or put in duress without an encroachment upon the functions of the Executive Department, except in Wisconsin, and, we submit, that no sound lawyer on reflection can give unbiased support to the Ekern case. The immunity from prosecution and imprisonment has always been put upon the high ground of the public welfare and the safety of the chief executive office

from interference by court procedure which might result in the arrest or coercion of the Governor.

Professor Burgess of Columbia University, an eminent text-writer on Constitutional Law, speaking of the immunity of the President from arrest, says:

"He is privileged from the jurisdiction of any court, magistrate or body over his person. He cannot be arrested or restrained of his personal liberty by *anybody*, or *anything*, not even for the commission of murder. He is responsible to one body only, *viz*: The Senate of the United States, organized as a court of impeachment under the presidency of the Chief Justice of the United States. * * *

"There is no danger to the people in this principle. There would be great and constant danger in the opposite theory. Under the opposite theory, any magistrate might, at the instigation of any individual, cause interregnum or a devolution of the presidential office, thus defeating the will of the whole people in the choice of the President, and exposing the whole people to the danger of anarchy. Moreover, as I have said, the principle only suspends the liability of the President to process. *Upon his descent from office he becomes immediately liable to prosecution for every crime and misdemeanor committed while in office.*"¹⁰

Professor James Albert Woodburn of Indiana University, in his recent work on *The American Republic*, quotes Professor Burgess with approval and adds:

"This exemption from process of the courts is only temporary, the right of prosecution is only suspended. Upon his retirement or removal from office, the ex-president becomes immediately liable to prosecution and punishment for every crime committed while in office."

In the case of *People v. Dunne*, *supra*, it was said:

"The duty or power committed to one branch of the government for its exercise by the constitution is not subject to interference, control or dictation by another branch;"

and approval was given to the separate opinion of Justice Breese in the Bissell case in these words:

(10) 2 Burgess Political Science and Constitutional Law, 245.

(9) Sec. 208 Criminal Code.

"It was said that the court had no control over Gov. Bissell to perform any duty, and that in matters of public duty the court committed him to the high tribunal of his own conscience and the public judgment."

The rule we invoke was correctly stated as long ago as the time of Lord Mansfield, not in relation to the King, but the Governor of the Island of Minorca. In *Fabregas v. Mostyn*,¹¹ he said:

"No criminal prosecution lies against a Governor and no civil action lies against him because what would be the consequence. Why, if a civil action lies against him and a judgment obtained for damages, he might be taken up and put in prison on a capias, and therefore, locally during the time of his government the court in the Island cannot hold plea against him."

In *State v. Holden* (Governor),¹² a criminal prosecution in which a bench warrant was sought for the Governor's arrest, it was said:

"The government was formed for the benefit of all the citizens of the state, and it would be of little force and efficiency if the Governor (in whom is vested the supreme executive power of the state) could be arrested, and thus virtually deposed by a warrant from the Judiciary issued upon the application of an individual citizen, for alleged excess of authority, the performance of what the Governor may consider his executive functions."

The constitutions of North Carolina and Illinois both provide that impeachment shall not exempt the officer impeached from prosecution, trial and judgment for any criminal offense committed while in office, so the rule is the same whether the charge is one of offense committed before or after the person took office.

In the case of *Appeal of Hartrauft*, Governor,¹³ it was held that the Governor could not be made subject to a decree in chancery, because it could not be enforced except by attachment, and the Governor could not be lawfully taken on attachment. The same rule was applied in *Thompson v. German Valley R. Co.*¹⁴ In the case of *State v. Frazier*, 114 Tenn. 519, it was said that if

appointed or named on a board it would be optional with the Governor as to whether he would serve, and discussing his independence under the Constitution, said:

"No court can coerce him. No court can imprison him for failing to perform any act, or to obey any mandate of any court."

In the case of *Rice v. Draper*,¹⁵ a petition for mandamus against the Governor was applied for. The Supreme Court of Massachusetts said:

"An order under a writ of mandamus against the Governor, if he should refuse to obey it, might present a strange spectacle of a direction by the court to the executive forces of the government to coerce and punish the chief executive officer of the state who commands and controls the military forces that are ultimately relied upon for the maintenance of the law. * * * The Governor shall answer to his own conscience, to the people who selected him, and in case of possible commission of high crimes or misdemeanors to a court of impeachment."

In the case of *People v. Morton*,¹⁶ the New York Court of Appeals said:

"The only way in which mandamus may be enforced is by commitment of the party who refuses its command, as for contempt. But the courts have no power to commit the Governor for a contempt. They have no power over his person. He may be impeached, but there is no other way in which he may be deprived of his executive office."¹⁷

The arrest or prosecution of the Governor of Illinois would leave the state government without an executive head. The duties of his office are all personal and can be performed by no other person as his proxy or agent. There is no constitutional provision which would devolve the office upon any one else in such case. Section 17 of article 5 only authorizes the Lieutenant Governor to exercise the office in case of the death, conviction on impeachment, failure to qualify,

(14) 22 N. J. Eq. 111.

(15) 207 Mass. 577, 32 L. R. A. (N. S.) 355.

(16) 41 L. R. A. 331.

(17) See also *Major v. Shields*, 272 Mo. 342; *United States v. Glayton*, Fed. Case 14814; *Hovey, Governor v. State*, 217 Ind. 588; *State v. Fletcher*, 39 Mo. 508; *State v. Stone*, 120 Miss. 438.

(11) 1 Cowper 161.

(12) 64 N. C. 829.

(13) 82 Pa. St. 433.

resignation, absence from the state, or other disability. The other disability referred to must be personal to the Governor and under the doctrine *ejusdem generis* can only relate to such disability as is indicated by the words, "death," "conviction on impeachment," "failure to qualify," resignation," or "absence from the state," in either of which absence of the power to function is complete and either temporary or permanent. There is no provision under which it could be argued that the arrest and trial of the Governor upon a criminal charge, or even his conviction, would vacate his office. While conviction for embezzlement would disqualify him to hold office, he would still remain in office until divested by a court procedure or by impeachment.

These authorities are all based upon the single proposition that because of the absolute identity of the person of the Governor with his office and the physical inability to coerce, imprison or put a Governor upon trial for a supposed criminal offense without interfering with the functions of the executive department and depriving the state of the executive head, the governor is exempt from arrest during his term of office, but it is everywhere recognized that he is not above the law, but subject to it and can only be punished in accordance with it after his person is lawfully separated from the chief executive office.

As said by the Supreme Court of Missouri in the Major case:

"The Governor's duty devolves on him by law under a higher authority than the order of a court, *i. e.*, the mandate of the constitution. The duties thus conferred are political, and his acts are entirely independent of the judiciary and for a failure to perform which he is responsible to the people alone. . . ."

Those who so loudly proclaim that the Governor should be subject to the Courts merely attempt to subordinate the executive to the judicial departments and make the judge the supreme authority, not only over his department, but over the executive department as well.

The absurd and vicious consequences of the contrary doctrine applied under the Constitution of Illinois appear in these considerations:

(1) In directing process for the arrest of the Governor after he had honestly determined that to submit to the jurisdiction of the court would violate his duties and oath of office was an effort to displace the will and judgment of the Chief Executive in relation to an executive duty with the will and judgment of the court, and an endeavor to coerce the chief of the executive department, in violation of the Constitution.

(2) If arrested or tried, during arrest or trial, the functions of the executive office will be suspended and the government of the state would be without a head.

(3) If convicted, the Governor would have the power to immediately pardon himself, as his conviction would not suspend the pardoning power which rests with him alone.

(4) The Constitution creates the Governor the supreme executive officer of the state, and in arresting him, a subordinate officer of his department, the sheriff, coerced him to imprisonment on the command of a co-ordinate branch of the government, the judiciary, thereby suspending the continuous functioning of the executive department in violation of the Constitution.¹⁸

(5) The Governor, as commander-in-chief of the militia, is vested with power, not only to call out the militia at will, but to determine for himself when to do so, and what shall be done in obedience to the command of the Constitution to take care that the laws be faithfully executed and to support the constitution; and his acts in accordance with his judgment as to when and how he shall exercise that power cannot be questioned in any place or by any person, except for a willful, that is, a knowingly and purposely committed violation of the Constitution.¹⁹

(18) Burr case.

(19) *In re Moore*, 64 N. C. 802; *In re Kerr*, 64 N. C. 816; *People v. Dunne*, 258 Ill. 441; *People v. Bissel*, 19 Ill. 229.

(6) If a court may determine that the Governor is acting willfully in construing the Constitution to require him to protect the Executive Department against invasion by the Judiciary and coerce the Governor, the Governor has an equal right to determine that the court is corruptly and willfully violating the Constitution in ordering his arrest and may use the militia to coerce the court, or may, when the court makes a decision which does not accord with the views of the Governor, arrest and imprison the judge, because the executive and judicial departments are upon an exact equality with respect to a construction by either of the powers and duties of the other under the Constitution.²⁰

(7) If the Governor can be arrested and put upon trial for an alleged criminal act committed before he was elected, or for an act not involving a malfeasance, misfeasance, high crime or misdemeanor in office, for which he might be impeached, he can, upon the complaint of any private citizen, be arrested and put upon trial for an act of misconduct in office or the most insignificant misdemeanor upon the command of the most insignificant court, or even by a constable without a warrant for a violation of the law which has, in fact, been committed if the constable has reasonable grounds to believe the Governor committed it.²¹

It is so apparent that the application of these principles would completely overthrow and destroy the Executive Department and produce anarchy that it would be truly surprising if any unbiased court should sustain the contention of those who insist that a Governor may be arrested and prosecuted for an alleged criminal offense while in office.

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(20) *People v. Dunne*, supra.

(21) *Crim. Code*, 2 J. & A. Ill. S. Am., § 4027, p. 2187.

INNKEEPERS—LIABILITY TO GUESTS.

FREWEN v. PAGE.

Supreme Judicial Court of Massachusetts,
Suffolk. May 31, 1921.

131 N. E. 475.

Where a hotel proprietor invaded the room of guests and ordered them to leave the hotel, and assaulted, falsely imprisoned and slandered the guests, damages might be assessed for humiliation and injury to the guests' feelings, as well as for the unwarranted disturbance of their right of privacy and exclusive use of the room, and such acts were not justified, though they arose from some mistake made by him or his agents in his records.

BRALEY, J. The only reference to the evidence in the record is the "statement of facts," from which it appears that the plaintiffs, who are husband and wife, were accepted as guests at the Hotel Langham, managed and kept by the defendant George H. Page, and the question whether they had been properly registered, as required by St. 1918, c. 259, § 5, has been answered in the affirmative by the jury. A finding would have been warranted that while in bed in a room assigned to them, to which they had been escorted and given a key, three employees of the defendant entered, followed by the defendant with a police officer, and although ordered to leave the hotel, the plaintiffs refused compliance with the order, and that evidence was offered "of an assault, of false imprisonment, and slander, all incidental to the plaintiffs' right to the quiet enjoyment of their room, but the defendant offered evidence to dispute this." We assume that this summary refers to what took place after the defendant came in and that the jury could find he acted as the proprietor in control of the hotel, and the employees and police officer were present at his direction and solicitation.

The action is in tort or contract. But at the plaintiffs' election by order of the court on motion of the defendant, the cases were submitted to the jury on the counts in contract, and general verdicts were returned for the plaintiffs. The jury having specially found that the plaintiffs had duly registered, they were rightly in occupation. The defendant's fifth and sixth requests, that if the defendants were violating the law in occupying a room without having been properly registered "that are precluded from recovering for any injury suffered while in the room," and the defendant was "justified in entering the room for the purpose of learning whether the law had been complied with,

and, if the occupants refused to assist him, he is justified in assuming that their presence is unlawful, and can use any reasonable means to remove them," are no longer material. See *St. 1918, c. 259, § 5*.

The questions raised by the seventh request, whether the defendant was "responsible for the acts of the police officer done by the police officer while in the performance of his lawful duty," and "that the police officer was acting within the scope of his lawful duty in entering the room * * * to investigate into the right of their presence there," were for the jury under suitable instructions. *Mason v. Jacot, 235 Mass. 521, 127 N. E. 331*.

The eighth request, that if the defendant had no intention of frightening the plaintiffs, but merely went to the room to ascertain whether they "had a right to be there," he is not responsible "for her fright, or the consequent injury to her health," is not supported by any legal presumption. The defendant was not justified in assuming the plaintiffs were not registered. The hotel registry disclosed their names, and he could not for this reason intrude upon their privacy. *Sampson v. Henry, 11 Pick. 379, 387*. It is necessary, however, to ascertain the respective rights of the parties upon which the defendant's remaining requests must rest. The defendant urges that consequential damages for breach of contract are limited to such damages as were within the contemplation of the parties at the time of entering into the agreement. But it was held in *Dickinson v. Winchester, 4 Cush. 114, 121 (50 Am. Dec. 760)*, that a plaintiff who had lost a trunk and its contents while a guest at the defendant's hotel could declare in case of assumption.

"The plaintiff may set forth a duty, and aver a fact in violation of it as a tort, or aver an implied promise to perform it, and a failure to perform that promise." *Vannah v. Hart Private Hospital, 228 Mass. 132, 117 N. E. 328, L. R. A. 1918A, 1157; Norcross v. Norcross, 53 Me. 163*.

The contract was not merely for the use of the room and entertainment, but for immunity from rudeness, personal abuse and unjustifiable interference, whether exerted by the defendant or his servants, or those under his control, or acting under his orders. The plaintiffs, having duly registered and been put in possession of a room for their exclusive use, had the right of occupation for all lawful purposes until vacated, subject only to the access of the defendant at reasonable times, and in a proper manner, for such purposes as might be necessary in the general management of the hotel, or upon the happening of some unanticipated,

controlling emergency. *Com. v. Power, 7 Metc. 596, 601, 41 Am. Dec. 465; Holden v. Carraher, 195 Mass. 392, 81 N. E. 261, 11 Ann. Cas. 724; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969; Lehnen v. Hines, 88 Kan. 58, 127 Pac. 612, 42 L. R. A. (N. S.) 830*.

If without any sufficient reason appearing in the record, the defendant, who is not shown to have given any previous notice, or made any request for their departure, entered the room for the purpose of compelling them to vacate, he is liable in damages if excessive force, or coercion, or intimidation was used, or his conduct towards the plaintiffs was abusive, insulting, and wanting in ordinary respect and decency. And his tenth request, that if as owner of the hotel he entered the room "for the purpose of inspecting the same and seeing that the rules of the hotel, and all statutory regulations were complied with, then he was acting within the scope of his legal right and was not a trespasser," is not supported by the record. The judge's instructions are not stated, and it must be inferred as against the excepting party that they were correct and sufficient. *Khron v. Brock, 144 Mass. 516, 519, 11 N. E. 748*. The jury could find that after entering the room he engaged in the wrongful acts charged without justification or excuse. See *Holden v. Carraher, 195 Mass. 392, 81 N. E. 261, 11 Ann. Cas. 724*. The general law is well settled. The guest is entitled to respectful and considerate treatment at the hands of the innkeeper and his employees and servants, and this right created an implied obligation that neither the innkeeper nor his servants will abuse or insult the guest, or engage in any conduct or speech which may unreasonably subject him to physical discomfort, or distress of mind, or imperil his safety. *Lehnen v. Hines, 88 Kan. 58, 127 Pac. 612, 42 L. R. A. (N. S.) 830; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969; Morningstar v. Lafayette Hotel Co., 211 N. Y. 465, 105 N. E. 656, 52 L. R. A. (N. S.) 940; McHugh v. Schlosser, 159 Pa. 480, 28 Atl. 291, 23 L. R. A. 514, 39 Am. St. Rep. 699; 13 R. C. L. Innkeepers, § 11 and notes*. And he can recover damages for injury to his feelings resulting from the humiliation to which he has been subjected. *Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. (N. S.) 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682; Aaron v. Ward, 203 N. Y. 351, 96 N. E. 736, 38 L. R. A. (N. S.) 204; Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503; De Wolf v. Ford, 193 N. Y. 397, 401, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am.*

St. Rep. 969; *Head v. Georgia Pacific Railroad*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. The plaintiffs are not shown to have annoyed or disturbed other guests, or to have improperly demeaned themselves, or to have violated any rules of the hotel, and under suitable instructions the jury on conflicting evidence could find the defendant had been guilty of assault, false imprisonment and slander, by "words spoken * * * imputing crime."

It follows that the plaintiff's four requests, that if they were unlawfully restrained of their liberty, the defendant is liable in damages, and if he incited, encouraged, or countenanced the presence and acts of the officer he is liable therefor, and that damages may be assessed for humiliation and injury to the plaintiff's feelings, as well as for unwarranted disturbance of his right of privacy and exclusive use of the room for himself and wife, and that even if the entry of the defendant arose from some mistake made by him or his agents "in his records," such mistake would not amount to a justification, were unexceptionable. The defendant's ninth request, that if the plaintiff suffered no physical injury, "she cannot recover for mental suffering," was properly denied. As we have said, he could not treat the plaintiffs with contumely by the use of insolent language concerning them, specifically set forth in the declaration, and referred to, and characterized in the record as "slander," which the jury could say caused the plaintiffs not only physical annoyance and discomfort, but also worry and distress of mind. *De Wolf v. Ford*, 193 N. Y. 397, 401, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969. The defendant's duty in this respect is analogous to that of a common carrier of passengers. *Com. v. Power*, 7 Metc. 596, 601, 41 Am. Dec. 465; *Jackson v. Old Colony Street Railway*, 206 Mass. 477, 485, 92 N. E. 725, 30 L. R. A. (N. S.) 1046, 19 Ann. Cas. 615; *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157. In uttering incriminating words in the presence of his servants and the police officer, the defendant violated his contractual obligation to the plaintiffs as guests, of courtesy and respectful treatment, and freedom from humiliation, contempt and ridicule arising from slanderous verbal attacks.

We are therefore of opinion that the cases come within the doctrine of *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311, and kindred decisions, and the plaintiffs can recover in contract, as fully as if they had sued in tort. The final request, that they "could not recover on their counts in contract for any damages resulting from words spoken, the slander, the false imprisonment, assault and battery, or for the

humiliation, but could only recover for the value of the room," even when read in connection with the special answers of the jury to questions propounded by the defendant and submitted at his request, is covered by what has been said, and the defendant having failed to show reversible error, the exceptions should be overruled.

So ordered.

NOTE.—*Liability of Innkeeper for Invasion of Guest's Right of Privacy*.—The business of an innkeeper is quasi public, and he is bound to respect the convenience, privacy, safety and comfort of his guests, and to courtesy and respectful treatment. *Hurd v. Hotel Astor Co.*, 182 App. Div. 49, 169 N. Y. Supp. 359.

The right of a guest to the use and possession of his room is subject to such emergent and occasional entries as the innkeeper and his servants may find it necessary to make in the reasonable discharge of their duties. *De Wolf v. Ford*, 193 N. Y. 397, 86 N. E. 527.

In the last cited case the Court said: "As a guest for hire in the inn of the defendants, the plaintiff was entitled to the exclusive and peaceable possession of the room assigned to her, subject only to such proper intrusions by the defendants and their servants as may have been necessary in the regular and orderly conduct of the inn, or under some commanding emergency. But for all other purposes, their occasional or regular entries into the plaintiff's room were subject to the fundamental consideration that it was, for the time being, her room, and that she was entitled to respectful and considerate treatment at their hands. Such treatment necessarily implied an observance by the defendants of the proprieties as to the time and manner of entering the plaintiff's room, and of civil deportment towards her when such an entry was either necessary or proper."

Where the servant of an innkeeper forcibly entered a guest's room, insulted her, etc., the guest may recover either on the theory of a tort or breach of contract. *Boyce v. Greeley, Square Hotel Co.*, 228 N. Y. 106, 126 N. E. 647, affg. 168 N. Y. Supp. 191.

BOOK REVIEW.

BERRY ON AUTOMOBILES—THIRD EDITION.

No subject of the law has grown faster in the last few years than the law relating to automobile traffic. To the student of legal history this phenomenon is interesting as he sees passing before his very eyes that which occurred in analogous cases hundreds of years ago. The development of the law merchant, of master and servant, of railroads, of electricity, etc., were in the same way the application of old principles to new situations created by the advancement of commerce, art

and invention, as well as changes in the mode of living. The common law is so elastic that it is able to fit any new situation in society and if the fiction that it constitutes a reservoir of principles to fit every possible situation which it is the duty of the court to discover has been exploded, yet the action of the judges in applying old principles to new situations is not conscious judicial legislation. There is always the attempt on the part of the judges to weave the new law into the warp and woof of the old, so that the law still shall be as it always has been considered to be, one homologous structure.

The law relating to automobiles is the application of principles of negligence, agency and master and servant to the motor-driven vehicle. There have necessarily been some pulling and stretching to make the old principles to fit the new situations, but the variations have not been as great or as numerous as one would be led to suppose.

These reflections have been prompted by examination we have just made of the third edition of Mr. C. P. Berry's work on Automobiles, which has just come from the press. Mr. Berry's second edition was a very good book, but the third edition has been revised so carefully and the scope so greatly enlarged that we are now prepared to say that from the practitioner's standpoint, it is the best work on the subject of automobiles which we have examined.

Besides being entirely rewritten, completely revised and brought up to date, this new edition contains six more chapters than the previous edition, and double the amount of material. The work is exhaustive and complete, covering the whole field of Automobile Law in its entirety. All the new phases of the law, such as Filling Stations, Jitneys, Insurance, etc., have been exhaustively dealt with.

A list of the chapter headings will give some idea of the wide range of the questions discussed in this treatise. They are as follows: 1, Definition and History; 2, Legal Status; 3, State Police Regulations; 4, Municipal or Local Police Regulations; 5, State License Laws; 6, Municipal or Local License Laws; 7, Federal Laws Affecting the Automobile; 8, Rights and Duties on the Highway Generally; 9, Regulation and Licensing—Failure to Comply with Law; 10, Regulatory Terms Defined; 11, Injuries to Pedestrians; 12, Injuries to Persons Boarding and Alighting from Street Cars; 13, Injuries to Children; 14, Injuries to Persons Employed in Streets; 15, Injuries to Occupant of Automobile; 16, Frightening Horses; 17,

Collisions with Street Cars; 18, Collisions with Railroads; 19, Collisions Between Automobiles; 20, Collisions of Automobiles with Other Vehicles and with Animals; 21, Injuries from Defective Highways; 22, Measure of Recovery for Damage to Automobile; 23, Evidence of Speed and as to Stopping; 24, The Chauffeur; 25, Liability of Owner When Automobile is Operated by Another; 26, Liability of Owner When Automobile is Operated by Member of Family or Guest; 27, Liability of Owner for Injuries to Chauffeur; 28, The Garage; 29, Filling Stations; 30, The Garage Man and the Repair Man; 31, Sales; 32, The Agent and the Manufacturer; 33, Liability of Manufacturer for Injuries Caused by Defective Automobile; 34, Automobile in Public Service; 35, Violation of Police Regulations and Prosecution Therefor; 36, Insurance.

The feature of the earlier editions maintained in the new is that the classification is according to the facts in each case. The section sub-headings are frequent and subdivide the facts minutely so that it is often possible for an attorney to get a case on "all fours" with his own.

Printed in one large volume of 1625 pages, on very thin paper and bound in a red flexible binding.

ITEMS OF PROFESSIONAL INTEREST.

CARNEGIE FOUNDATION BULLETIN ON LEGAL EDUCATION

Announcement is made of the publication, August 27th, of Bulletin Number Fifteen, entitled "Training for the Public Profession of the Law;" subtitle, "Historical Development and Principal Contemporary Problems of Legal Education in the United States, with some Account of Conditions in England and Canada," by Alfred Zantlinger Reed; 469 pages 8 vo. and Index.

This volume is an outcome of a study of legal education and cognate problems, undertaken some years ago at the request of the Committee on Legal Education of the American Bar Association. The Foundation will be glad to distribute copies gratuitously as promptly as labor difficulties permit, on written application to its Division of Educational Enquiry, 522 Fifth Avenue, New York City.

CORRESPONDENCE.

COMPETENCY OF COURTS TO DECIDE
SCIENTIFIC QUESTIONS

Editor, Central Law Journal:

Your issue of August 12th, on page 96, quotes a statement of Dean Roscoe Pound, of Harvard: "There is a growing disposition on the part of every learned profession to question the competency of the lawyer to determine scientific problems." Is it a growing disposition or a known fact?

Relative to resistance of materials the Federal Reporter furnishes ample evidence that the knowledge of the geography of strain possessed by the Federal Judge presents the same lack of precision evidenced by the college freshman's definition of longitude as the distance East and West of the Equator.

The mental dead reckoning of longitude by this definition leaves us somewhere in the regions of nowhere, just as do our court decisions on the engineering phases of the patent case. Thus, in the Third Circuit we have four judges holding that all the engineer does in designing concrete is to put steel in where strains come in defiance of the law of rigidities and least work. We find in the Eighth Circuit a confusion of applied shear force with shear strain. In comparing two cases where the applied forces are the same, in one the shear strain is zero next to the support (proportional to the sum of the moment areas) and in the other a maximum at the support for the same reason because the bending moments are the same sign throughout in the latter case and in the former they are of opposite signs over and between the supports. Yet, the court held that the shear strains were greatest at the support where they are zero and the two cases alike; in other words, that nothing equals something. The maximum shear strain in one case would be about one-fifth as great as in the other and the maximum value which occurs at different places was held by the court to occur at the same place. In the Third Circuit we have the finding that circular and radial strains in all directions are equivalent. The latter measures deflection—the former is related to it about as closely as the distance East or West of the Equator is to longitude.

The expressed amazement of an entire Court of Appeals at the statement that a floor bends or deflects under load disclosed a mental grasp of the subject of resistance of materials far inferior to that possessed years before the Christian Era.

In general the blunders of the Federal Courts on such elementary matters result from heedlessness in the reversal of the deliberate opinion of the trained engineer examiners of the Patent Office upon engineering questions which the examiners are conversant with while the courts as now constituted are not.

Should the builder erect concrete buildings on the pseudo equitable principle enunciated by the 8th C. C. A., i. e., putting the steel in the top of a floor is the plain mechanical equivalent of putting it in the bottom, would not the public insist upon re-enactment of the old Building Code Law of Hamurabi to the effect that, if a builder constructs a house and the work be not firm and it falls and kills the owner thereof, then shall the builder's life be forfeited therefor.

And yet the lawyer would have the layman believe that we now have a practical system for the encouragement of all the scientific arts!

Yours very truly,

C. A. P. TURNER.

Minneapolis, Minn.

HUMOR OF THE LAW.

"Shay, offisher, wheresh th' corner?"

"You're standing on it."

"S no wonder I couldn't find it."—*Puppet*.

A judge's little daughter, who had attended her father's court for the first time, was very much interested in the proceedings. After her return home she told her mother.

"Papa made a speech, and several other men made speeches to 12 men who sat all together, and then these 12 men were put in a dark room to be developed."—*Pearson's Weekly*, London.

Early in his career as a lawyer, Chief Justice White was once called upon to defend a man who had stolen a pair of pants. The man was seated with his legs under a large table, when Mr. White sat down and asked him something about the case. The man was most reticent. Finally the lawyer for the other side called the accused to take the stand. The prisoner turned to Mr. White and said:

"Jedge, I don't want to take the stand."

"Why not?" asked Mr. White. "You're perfectly innocent, aren't you?"

"Yes, sir, I'se perfectly innocent as long as I sit with my feet under the table, but if I get up on the stand—oh Lord, Jedge, the trouble is I'se got them pants on!"

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Attorney and Client**.—Disbarment.—A disbarment proceeding is not a prosecution for crime.—*San Francisco Bar Ass'n v. Sullivan*, Cal., 198 Pac. 7.

2. **Lien**.—Where an attorney was retained by a temporary administratrix to collect moneys on deposit belonging to the estate, but collected nothing in the actions he brought, which did not come to trial, his lien against the estate, if any, attached only to papers in his possession in the actions for which he was specifically retained; there having been no services rendered by him inuring to the benefit of the estate.—*In re Farmers' Loan & Trust Co.*, N. Y., 188 N. Y. S. 374.

3. **Ballment**.—Admissibility of Evidence.—In an action to recover the value of a set of furs shipped to defendants to be repaired, which plaintiff claimed was expressed by them, by mistake, to one T., the admission of testimony of one of plaintiff's witnesses that he saw Mrs. T. wearing some furs like some he saw exhibited in the courtroom, which plaintiff had testified were similar to hers, did not justify a new trial.—*Rhyne v. Munter*, N. C., 107 S. E. 238.

4. **Bankruptcy**.—Devise in Trust.—One to whom land was devised in trust for the heirs of his body had no title which he could mortgage or convey or which passed to his trustee in bankruptcy.—*City Nat. Bank v. Slocum*, U. S. C. C. A., 272 Fed. 11.

5. **Discharge**.—A bankrupt's discharge was not barred on the ground that he made a false oath in his schedule, in that he denied ownership of certain lots, where a creditor, more than a year before the bankruptcy, had secured judgment against him, which became a lien upon, and for several times the value of, the lots, and within less than 20 days after the alleged false oath the same creditor got a tax title to the lots, and, more than two years before the alleged false oath, the bankrupt had executed a warranty deed to the lots, but it had never been recorded.—*In re Lundberg*, U. S. C. C. A., 272 Fed. 107.

6. **Mortgaged Property**.—A sale of a bankrupt's mortgaged property free from liens under an order of the bankruptcy court gives the purchaser the same title as if the sale were made in any other court of equity to foreclose the mortgage or marshal the assets of an insolvent, and his title is good against the privies of the mortgagor and mortgagees, including the wife of the mortgagor, who has renounced her dower.—*Gantt v. Jones*, U. S. C. C. A., 272 Fed. 117.

7. **Powers of Trustee**.—Under Bankruptcy Act, § 47a, subd. 2, as amended by Act June 25, 1910, § 8, and in view of sections 70a and 70e

(section 9654), a trustee in bankruptcy is deemed vested with all the rights and powers of a creditor holding an unsatisfied execution, and may avoid any transfer fraudulent as to creditors which a creditor might have avoided, had bankruptcy not intervened.—*Ignatius v. Farmers' State Bank*, U. S. C. C. A., 272 Fed. 33.

8. **Preferential Payments**.—The payment of a dividend, by the receiver of a state court appointed for an insolvent partnership in a suit by one partner for dissolution, to such creditors as presented their claims within four months prior to bankruptcy of the partnership, held to operate as a voidable preference, as against other creditors, who were without notice and did not participate, and to entitle them, on proving their claims in bankruptcy, to payment of an equal percentage thereon before further dividends were paid; for the primary purpose of the bankruptcy act is to give to all unsecured creditors the same percentage of their claims, and a court of bankruptcy should administer it broadly as a court of equity to that end.—*Farnsworth v. Union Trust & Deposit Co.*, U. S. C. C. A., 272 Fed. 92.

9. **Banks and Banking**.—Authority of Cashier.—A cashier of a bank is not, simply by virtue of his position as cashier, vested with authority to bind the bank if he agrees with one of the makers of a note to sell collateral, especially when the collateral is not salable at as high a price as agreed upon between the cashier and a maker of the note.—*Hager v. President, Etc., of Hagerstown Bank, Md.*, 113 Atl. 730.

10. **Certified Check**.—After a check is certified by a bank, at the request of the holder or payee, the defense that the check is void because the consideration is illegal is not open to the bank. The transaction is this: The bank says, The check is good; we will pay it now, if you will receive it. The holder then says, No, I will not take the money now; you may retain it for me, until the check is presented for payment. The bank replies, Very well; we will do so—thus substituting a new contract between the holder of the check and the bank.—*Jones v. National Bank of North Hudson*, N. J., 113 Atl. 702.

11. **Credit for Check**.—A printed notice, sent by mail by bank which received check drawn on it by mail from depositor: "We beg to acknowledge receipt of your favor of 8-6. We have entered to your credit \$3,567.50. All other items than those drawn on this bank are credited subject to final payment"—and the making of a deposit slip, a copy of which was inclosed with the notice, showed an intention to give the depositor absolute credit for the amount of the check.—*Cohen v. First Nat. Bank of Nogales, Ariz.*, 198 Pac. 122.

12. **Bills and Notes**.—Negotiability.—In view of Rev. St. 1919, § 790, despite section 791, notation on a note that it was given to secure the difference between \$15,000 and \$13,820 did not destroy its negotiability under section 788, "secure" meaning to make secure to protect, or to free from danger, risk, or hazard, to make safe.—*Morehead v. Cummins*, Mo., 230 S. W. 656.

13. **Carriers of Goods**.—Damages.—A rule of the railroad during the war that shipper must load cars within 24 hours had no application in an action for damages for failure to furnish a car on Tuesday, in compliance with an order for a car to be set in at a station to be coopered on Monday and loaded the day following, and agreement to do so, it appearing that the car was placed the previous Saturday and, after being coopered by plaintiff on Monday, was withdrawn on Tuesday, the day on which the shipper ordered it for loading and when he was ready to do so.—*Bartlett v. Missouri Pac. R. Co.*, Mo., 230 S. W. 660.

14. **Switching Service**.—When a cement company having its plant located five or six miles from its quarry, where it obtains its rock and shale used in the manufacture of cement, contracts with a railroad company to transport its rock and shale from the quarry to the plant, the rock and shale being loaded into the cars by the cement company's employees, the railroad company by its employees attaches its engine to said cars, connects them up hauls the loaded cars to the cement plant, and returns the empty cars to the quarry, this constitutes a switching

service, and not a road haul, notwithstanding the railroad company may use approximately five miles of its main line of road in transporting such cars from the quarry to the plant and returning the empties to the quarry.—*St. Louis-San Francisco Ry. Co. v. State, Cal.*, 198 Pac. 73.

15. **Carriers of Live Stock—Act of God.**—A carrier is liable for damages proximately caused by an act of God, in case its failure to use reasonable diligence to prevent or mitigate the damage contributes to the loss.—*Rice v. Oregon Short Line R. Co., Idaho*, 198 Pac. 161.

16. **Carriers of Passengers—Assault.**—In a minor's action for personal injuries through being shot by a deputy sheriff on being ejected from a train for non-payment of fare, evidence that the conductor caused rocks to be thrown at plaintiff while on top of a coach, and firing a shot in the air for the purpose of scaring him, held not to show an unlawful assault or wrongful exercise of authority in accomplishing the ejection.—*Samaritano v. Galveston, H. & S. A. Ry. Co., Tex.*, 230 S. W. 1049.

17. **Negligence.**—In an action against a railroad for injuries to a passenger, where a count of the complaint contained a description of the means of injury and of the physical circumstances surrounding it, together with a general averment of negligence for which defendant railroad was liable and there were also allegations showing the relation of carrier and passenger, on injury being shown, the burden was cast on defendant railroad to acquit itself of negligence.—*Tennessee, A. & G. Ry. Co. v. Rossell, Ala.*, 88 So. 362.

18. **Negligence.**—A street car conductor was not negligent in failing to prevent passengers from crowding as they left the car, where there was no reason to expect anything unusually dangerous; the passengers not being disorderly or unruly or acting in such a manner as to call for any interference by the carrier or its agents.—*Ritchie v. Boston Elevated Ry. Co., Mass.*, 131 N. E. 67.

19. **Negligence.**—A carrier's failure to adopt reasonable expedients to avoid danger from crowds struggling to get on its cars is negligence rendering it liable for injury thus proximately caused.—*Grubb v. Kansas City Rys. Co., Mo.*, 230 S. W. 675.

20. **Constitutional Law—Divorce.**—Laws 1917, p. 183, § 10, providing that the death of either party to a divorce action during the six months following the findings and conclusions of law shall operate automatically to grant a divorce to person to whom divorce might have been granted, had the full period expired, held not unconstitutional as an encroachment upon the judiciary in violation of Const. Art. 3.—*Parsons v. Parsons, Col.*, 198 Pac. 156.

21. **Corporations—Assignment of Contract.**—One suing on a contract claimed to have been assigned to him by a corporation could not recover, where there was nothing to show by whom the alleged assignment was executed that the person executing it had any authority to act for the corporation, that there was any ratification of his act by the corporation or its directors, or that there was any acquiescence in the assignment or knowledge of it by any other officer of the corporation.—*Pritchard v. Uphams Corner Theatre Co., Mass.*, 131 N. E. 70.

22. **Exchange of Stock.**—A contract whereby defendants, who exchanged certain corporate stock for stock of other corporation owned by plaintiff, agreed to return to plaintiff such other stock, on 30 days' notice of plaintiff's desire to have such stock, instead of defendant's stock, given within 60 days from date of contract, held valid as against contentions that it was unilateral and was void for want of mutuality and lack of consideration.—*Fast v. Baker, Ind.*, 131 N. E. 57.

23. **Intrastate Transaction.**—Where a Michigan corporation conducting business in Illinois purchased standing timber from the owner of land in Kentucky, held, that the transaction was not interstate, so that Ky. St. § 571, requiring the filing of statement showing the corporation's office or offices, and agent or agents within the state, was applicable.—*E. C. Artman Lumber Co. v. Bogard, Ky.*, 230 S. W. 953.

24. **Damages—Purchasing Power of Money.**—In a personal injury action, the jury in deter-

mining the amount expended by the plaintiff for doctor's bills and medicines may consider the difference between the purchasing power of a dollar at the time plaintiff expended it and its purchasing power at the time of the trial.—*Tennessee River Nav. Co. v. Woodward, Ala.*, 88 So. 364.

25. **Easements—Light and Air.**—Where a deed describing a lot as bounded in the rear by vacant land which was to be forever kept open for light and air created an easement, in so much of the vacant land as was reasonably necessary for the use and enjoyment of the easement, a distance of 10 feet from the dividing line between the dominant and servient estates is a reasonable distance at which structures excluding light and air may be erected unless some extraordinary circumstances are shown.—*Tidd v. Fifty Associates, Mass.*, 131 N. E. 77.

26. **Elections—Mark on Ballot.**—Court properly held that a curved line of lighter shade connecting the ends of the two lines making the cross with which the ballot was marked in the circle of the Democratic emblem was not a distinguishing mark, where it did not appear to have been made by design, but was probably made by some nervous twitch of the hand holding the pencil.—*Roberts v. Donahoe, Ind.*, 131 N. E. 33.

27. **Eminent Domain—Exclusive Use.**—Under Code Supp. 1913, § 2120t, authorizing an electric power company to condemn a 25-foot strip for a right of way, the company does not acquire an exclusive use of such strip, but only a necessary interest in the land to enable it to exercise its franchise.—*Draker v. Iowa Electric Co., Iowa*, 182 N. W. 896.

28. **Just Compensation.**—Burns' Ann. St. 1914, § 934, meets the constitutional requirement as to manner of condemning property, in that it provides the procedure to be followed, reserves title to the owner until payment therefor is fully made, and meets "just compensation" at the time of notice of intended appropriation by requiring "actual value" of all property actually taken, and "actual value" as the basis of damages to the landowners' property not actually taken, but injuriously affected by such appropriation.—*Schnull v. Indianapolis Union Ry. Co., Ind.*, 131 N. E. 51.

29. **Executors and Administrators—Res Adjudicata.**—An order of sale of a two-thirds interest in land under a petition filed by administrator to sell such interest to pay the debts of deceased, claimed by administrator to be the owner of the entire land, was not res adjudicata as between the widow of deceased and her children and their privies as to the other third, the widow's right to one-third not being in issue, and the widow and children not being adversary parties.—*Mossman Yarnelle Co. v. Fee, Ind.*, 131 N. E. 59.

30. **Frauds, Statute of—Contract to Make Will.**—Where services have been performed in consideration of decedent's oral promises to make a will in favor of claimant against his estate, a contract unenforceable under the statute of frauds, claimant is entitled to recover the value of his services, not pursuant to the terms of the contract, but on a quantum meruit; the value of the services performed, and not the value of the property agreed to be conveyed, being the measure of damages.—*Hensley v. Hilton, Ind.*, 131 N. E. 38.

31. **Insurance—"Accidental Means."**—Railway postal clerk, who was ruptured while lifting heavy sack of mail while engaged in his customary work, where the bag was not any heavier than any other bags which he had lifted in the same way and the pile upon which he was attempting to place it was not any higher than usual, was not entitled to recover under certificate insuring him against injuries "through external, violent, and accidental means"; the means used by him to place mail bag on pile being exactly those used on other occasions, and therefore not "accidental means," within the certificate.—*Fane v. National Ass'n Railway Mail Clerks, N. Y.*, 188 N. Y. 222.

32. **Change of Employment.**—Where by-laws of benevolent society gave it the right to cancel the certificate on change of employment by member if the new employment augmented the risk, and required the member to notify the society in such case, the member's failure to

give notice of change in occupation was no defense in action on certificate, where the change in occupation did not increase the hazard.—*Porter v. Commonwealth Casualty Co., Pa.*, 113 Atl. 688.

33.—**Dispute.**—Under St. 1907, c. 576, § 60, prescribing a standard form of fire insurance policy, providing for a determination of the loss in case of dispute by reference to three disinterested referees, and that such reference shall be a condition precedent to any right of action, and the further provision of section 60 for appointment of the third referee by the insurance commissioner in case those chosen by the parties fail to agree, where the third referee was never chosen and no application for his appointment was ever made to the insurance commissioner, and defendant waived none of its rights, there could be no recovery.—*Nadeau v. Insurance Co., Mass.*, 131 N. E. 69.

34.—**Liability of Medical Examiner.**—Where agents of a life insurance company had a physician who took out a policy appointed medical examiner for the insurer on his agreement to pay the note given for the premium advanced by such agents with funds received for examinations, such physician, who received some \$485, but paid only \$85 on the premium note of \$258, while tenaciously holding the policy, is estopped to deny his liability on his premium note to the agents, despite partial breach on the agents' part through failure to give the physician enough examinations in the six months at the end of which the note became due to pay it, such provision having been waived by the physician's agreement to give the agents all he might make for six months more.—*Dobbs v. Johnson, Tex.*, 230 S. W. 1035.

35.—**Intoxicating Liquors.**—*Alaska Bone Dry Law.*—The Alaska Bone Dry Law, approved February 14, 1917, was not impliedly repealed by Const. Amend. 18, or the National Prohibition Act.—*Koppitz v. United States, U. S. C. A.*, 272 Fed. 96.

36.—**Possession.**—Since the passage and approval on January 25, 1919, of the act known as the "Weekly Bone Dry Law," it has been unlawful for any person to have in his possession or to possess in the state any spirituous, vinous, or malt liquors, or any other prohibited liquors or beverages, in any quantity whatsoever.—*Lyles v. State, Ala.*, 88 So. 375.

37.—**Possession.**—Though C. S. § 3379, makes it indictable to have any quantity of intoxicating liquor in possession for the purpose of sale and makes the possession of more than one gallon prima facie evidence of the illegal purpose, it is not against the state law to have in possession liquor lawfully obtained for one's own use.—*State v. Helms, N. C.*, 107 S. E. 228.

38.—**Prima Facie Case.**—In prosecution for having in possession prohibited liquor, state made out a prima facie case where witness testified that he had drank beer that the contents of the bottle in question looked like beer and foamed like beer, that it smelled and tasted like beer, and that the only difference that he had found was that it did not have the kick.—*Patterson v. State, Ala.*, 88 So. 360.

39.—**State Statute.**—Act 36th Leg. 1st and 2d Called Sess. (1919), c. 78, making it unlawful to possess intoxicating liquors for other than enumerated purposes, is not unconstitutional because Const. art. 16, § 20, amended, while forbidding manufacture and sale of such liquors, does not forbid possession thereof; especially as it authorizes prohibitory laws and laws in aid thereof.—*Banks v. State, Tex.*, 230 S. W. 994.

40.—**Landlord and Tenant.**—**Landlord's Lien.**—As a lease, stipulating for liquidated damages for default to be a lien on lessee's household goods, created a lien of no higher order than a chattel mortgage and was subject to Burns' Ann. St. 1914, §§ 8636, 8637, declaring possession shall remain in the mortgagor until sale, the landlord, in a suit to foreclose his lien, had no right of possession before final judgment foreclosing the lien, and so was not entitled to have a receiver appointed.—*Cowles v. Bick, Ind.*, 131 N. E. 36.

41.—**Reasonable Rent.**—In a summary proceeding by landlord against tenant for possession of premises and for non-payment of rent, under Code Civ. Proc. § 2231, as amended by

Laws 1920, c. 945, the justice may decide what is a reasonable amount of rent and that the stipulated rent is unreasonable, for, although, such statute does not delegate such power, chapter 944 does in relation to actions for rent only, and Code Civ. Proc. § 2244, as amended by Laws 1920, c. 132, provides for determination of the amount of rent in case of establishment of a defense or counterclaim in whole or in part.—*Needelman v. Levine, N. Y.*, 188 N. Y. S. 364.

42.—**Summary Proceedings.**—Under Laws 1920, c. 945, summary proceeding for non-payment of rent cannot be maintained, unless the landlord alleges and proves that the rent of the premises described in the petition is no greater than the amount for which the tenant was liable for the month preceding, and hence, where the landlord's proof admittedly showed that the rent sought exceeded the rent for the previous month, the proceeding cannot be maintained, regardless of any waiver by the tenant's answer.—*Spinelli v. Michelli, N. Y.*, 188 N. Y. S. 321.

43.—**Libel and Slander.**—**Actionable per se.**—Where defendant stated that he went on a note with plaintiff and had to pay it all and that plaintiff would not talk about repaying it and was a rascal, the words were not actionable per se, for the term "rascal," while an opprobrious expression, does not charge an offense indictable under the law, and it did not appear that the words were spoken of plaintiff concerning his business and employment; hence, in the absence of averment and proof of special damages, only nominal damages could be recovered.—*Jones v. Spradlin, Ala.*, 88 So. 373.

44.—**Licenses.**—**Not Recoverable.**—Assuming that the statute requiring demand for the return of an illegal tax to be made within 30 days after payment of the tax did not apply to a license tax illegally imposed by a city on the operation of an automobile for hire, the tax could not be recovered back, when not paid under protest as required at common law.—*Blackwell v. City of Gastonia, N. C.*, 107 S. E. 218.

45.—**Master and Servant.**—**Arbitration Stipulation.**—A contract between a traction company and its employees, by which it was mutually agreed that if at, or within 30 days prior to the expiration of this agreement, any controversy should arise between the traction company and its employees as to the wages to be paid after the expiration of the agreement, the matter should be referred to arbitrators, does not apply to a dispute arising during the term of the contract.—*In re Division 132 of Amalgamated Ass'n of Street & Electric Ry. Employees of America, N. Y.*, 188 N. Y. S. 353.

46.—**Course of Employment.**—**Fatal Injuries** to physician's chauffeur, while taking friends on a pleasure trip before he was to call at a designated place for the physician, did not arise out of his employment within the contract of the insurance carrier, and does not entitle his wife to compensation, though the physician stated that his chauffeur was continuously in his employ, and that he made no objection to his driving the car, so long as he appeared at the time and place ordered.—*Lansing v. Hayes, N. Y.*, 188 N. Y. S. 329.

47.—**Monopolies.**—**Restraint of Trade.**—Contract between manufacturer and dealer giving dealer exclusive right of sale in certain territory and obligating him not to sell similar goods of any other manufacturer in such territory held in violation of the state anti-trust statutes.—*Fred Miller Brewing Co. v. Coonrod, Tex.*, 230 S. W. 1099.

48.—**Municipal Corporations.**—**Fire Protection.**—Where a municipality owned a waterworks, the failure to furnish water for fire protection, which resulted in the destruction of property, does not expose the municipality to action, for while the municipality has the liabilities of a private owner with respect to water furnished for private use to individual citizens, its action in furnishing water for fire protection is governmental, and such is the declared rule of C. S. § 2807.—*Mack v. Charlotte City Waterworks, N. C.*, 107 S. E. 244.

49.—**Ice on Sidewalk.**—Where a builder engaged in erecting a building is authorized by the city to occupy a portion of the adjacent street and

to lay a temporary walk around the obstruction, his acts done under and within the authority granted are lawful, and he is not liable to a pedestrian for injuries caused by stumbling or slipping on an accumulation of snow and ice formed by natural causes on a temporary walk constructed under such authority.—*Boecher v. City of St. Paul, Minn.*, 182 N. W. 908.

50.—*Injury by Police Officer*.—Where plaintiff alleged to have been injured by negligence of a police officer, sued on a bond given by the officer, who was required by the city to perform certain duties in the fire department in addition to his other duties, it was not incumbent on plaintiff to determine whether at the time of the accident the officer was doing more duty as a policeman than as a fireman, if he was performing any duty as a policeman.—*Manwaring v. Geisler, Ky.*, 230 S. W. 918.

51.—*Negligence*.—Complaint in action by employee of city contractor against city that city and its agents were negligent "in failing to inspect the same, and in failing to give the deceased notice of the insecure, unsafe, and dangerous condition, and allowing the deceased to work and climb a pole without notice of its unsafe and dangerous condition; that the defendant had due notice of such unsafe and dangerous condition, and of the fact that work was to be done thereon by deceased and others, and that the condition of said pole rendered work thereon unsafe and dangerous," held to state a cause of action against the city for negligence.—*Miller v. City of Rochester, N. Y.*, 188 N. Y. S. 335.

52.—*Nuisance*.—A municipal corporation may be enjoined from maintaining and operating a sewage disposal plant or tank which is too small to care for the sewage flowing into it, thereby polluting a stream, where the structure can be so enlarged or added to as to stop the continuance of the nuisance; for in operating a sewer a city exercises a corporate power, as distinguished from a governmental function.—*City of Pittsburg v. Smith, Tex.*, 230 S. W. 1113.

53.—*Zoning Ordinance*.—A village zoning ordinance is invalid under P. L. 1920, p. 455, granting authority to pass such ordinances, where it does not apply to all persons alike throughout the zone, but provides for special permits to be granted by the board of trustees after a hearing.—*Village of South Orange v. Heller, N. J.*, 113 Atl. 697.

54.—*Railroads*.—Donation of Right of Way.—Where plaintiff desired to have defendant's railway located near his premises and clearly understood that he was being solicited to grant a right of way along the street in front of his property without compensation, a statement of defendant's agent, that other landowners three miles or more distant from plaintiff's place and not owning land on the same street, had agreed to donate a right of way, was not such a material representation of an existing fact as could be made the basis of the rescission of plaintiff's contract, even if false.—*Smith v. Waterloo, C. F. & N. Ry. Co., Iowa*, 182 N. W. 890.

55.—*Sales*.—Law of Domicile.—The domicile of the owner is not always controlling as to the law which governs a contract for the sale of personal property, but such sale may, like all sales of land, be governed by the law of the place where the property is situated.—*Gaston, Williams & Wigmore of Canada v. Warner, U. S. C. C. A.*, 272 Fed. 56.

56.—*Measure of Damages*.—In case of a sale calling for delivery of the goods in New York City, where payment was to be made on presentation to plaintiff buyer of a sight draft with bill of lading attached, after exercise of the buyer's privilege of examining the goods on arrival, the value of the contract to plaintiff buyer is to be fixed by the market price in New York of the goods deliverable there, and on breach of the contract by defendant seller by its total failure to deliver the damage sustained by plaintiff buyer was the difference between the purchase price as fixed by the contract plus the freight charge to New York and the market price in New York City at the time when they were deliverable, despite a provision of the contract fixing the price f. o. b. San Francisco.—*Standard Casing Co. v. California Casing Co., N. Y.*, 188 N. Y. S. 358.

57.—*Ships and Shipping*.—Breach of Warranty.—In a suit in rem against a vessel under charter for failure to deliver cargo, which was lost by the sinking of an unseaworthy barge hired by the charterer for use in discharging the ship, the charterer held entitled to bring in both the broker from whom it hired the barge and its undisclosed owner, for whom the broker acted as agent, and to a joint and several decree against both for breach of the implied warranty of seaworthiness of the barge; for the doctrine of election is not applicable, as the wrong sounds in tort as much as in contract.—*The Jungshoved, U. S. D. C.*, 272 Fed. 122.

58.—*Specific Performance*.—Implied Condition.—The defendant leased to the plaintiff for 10 years a large tract of land in which there was a partially developed stone quarry, and agreed to convey to him one-half of the land at the expiration of the lease, it being then in force. The plaintiff did not agree to develop a quarry and expressly exempted himself from liability for a failure to do so. The parties contemplated, as a vital part of the consideration for a grant of one-half the lands, that the plaintiff would develop or make a genuine effort to develop a quarry, and such development or effort to develop was an implied condition of the agreement to convey. There was no such development or effort to develop and the court rightly denied specific performance.—*Reynolds v. Pike-Horning Granite Co., Minn.*, 182 N. W. 906.

59.—*Signature of Wife*.—A bill by the purchaser against the vendor and his wife for specific performance of the contract of the vendor to sell and convey his land, not signed or acknowledged by his wife, but with whom she joined in an undelivered deed therefor, is good on demurrer, if not appearing from the bill that defendants had refused to execute the contract by delivery of the deed because of the wife's revocation of her undelivered deed and her refusal to join with her husband in the delivery thereof, such matter, if good, being matter of defense not presented by demurrer to the bill.—*Walter v. De Moss, W. Va.*, 107.

60.—*Street Railways*.—Increase in Fare.—Where a railway company's track is unsafe, imperiling life and limb of passengers, and its condition makes riding physically uncomfortable, and trains are not run according to schedule, and the equipment is insufficient, such defects diminish the company's revenue, and its excuse for allowing such a situation to exist after having been ordered by the Board of Public Utilities to remedy such defects that it has no money with which to do so is no reason why the railway should be equipped and operated at public expense.—*New Jersey Central Traction Co. v. Board of Public Utility Com'rs, N. J.*, 113 Atl. 692.

61.—*Rate Base*.—In fixing the present value of a street railway company for the purpose of a rate base, the reproduction method should be applied reasonably, and as applied to the inflated values which have arisen since and because of the war it must appear that the level of prices is not transitory.—*Galveston Electric Co. v. City of Galveston, U. S. D. C.*, 272 Fed. 147.

62.—*Taxation*.—"Gain Derived."—Where, in year 1919, when Income Tax Law went into effect, owner sold securities for less than the price at which he had purchased them prior to that year, but in excess of their market value on January 1st of that year, the state comptroller improperly included in the gross income of the seller, as defined by section 359, the difference between the market value on January 1, 1919, and their selling price, since the "gain derived," spoken of in section 353, means such gain as is described and referred to in section 359.—*People v. Wendell, N. Y.*, 188 N. Y. S. 301.

63.—*Insane Asylums*.—St. 1914, c. 518, § 1, providing that real and personal property of charitable corporations, occupied as an insane asylum, etc., shall not be exempt from taxation unless at least one-fourth of such property is used for the treatment of indigent insane persons, etc., as resident patients without charge, is not invalid as creating an irrational, oppressive, arbitrary, or unequal classification, though such classification in fact includes only two corporations.—*Massachusetts General Hospital v. Inhabitants of Belmont, Mass.*, 131 N. E. 72.

Central Law Journal.

St. Louis, Mo., September 9, 1921.

HOW THE ENGLISH CHASED THE AMBULANCE CHASER.

When it existed in England, they called it "running-down actions." Just why our cousins so described the energetic gentry who once sat upon the hospital steps, sent flowers to "prospects" and had co-conspirators to write effusively to the injured of their "fine qualifications" as "damage suit" lawyers, excites the curiosity only. The English ambulance chaser is as extinct as the dodo. It is proposed to describe how this festering sore was cut from the body of English juristic activities with the hope that a splendid example will be emulated in America. What is to be said will prove as interesting to active charity workers as to the judge and lawyer. A description of the activities of "ambulance chasers" would be surplusage, since the breed is the same wherever it flourishes and its mode of depredating upon the helpless or ignorant was about the same in England as it is in America.

As soon as the Judges of England were set free, by the adoption of rules of court, to exercise their God-given discretion and good judgment, one of the first things they did was to stop abuses, committed by a few bad lawyers, it is true, but abuses that had reflected upon the good name and intent of the Bench and Bar, and that tended to lower the high ethical standing of a noble and necessary profession. The first offender, because he was the most flagrantly wicked, to feel the restraining hand was the "ambulance chaser." It required several efforts, as will now be shown.

The life of the ambulance chaser depends upon money—"damage money." The famous Order XXII, Rule 15, promulgated

in 1883, therefore went to the heart of the problem when it took away from them, and placed under the control of the judges, all money recovered in any trial court by an infant or by a "person of unsound mind not so found by inquisition." Instead of paying the proceeds to the "counsel in the case" or to some other person, the judge was empowered to pay reasonable compensation and to direct the disposition of the balance. This he did by causing the defendant to pay it into Court, to be invested or otherwise used, both as to principal and interest, in the sound discretion of the judge. Upon becoming *sui juris* the beneficiary was entitled to receive the money.

On account of the manner of selection, compensation and retirement, of which we shall later speak, there is no such thing as a corrupt or incompetent judge in England, though there may be some arbitrary ones, for judges are human. The funds were, therefore, safe from dissipation. But, as will presently be seen, this point is immaterial, since the practical Englishman soon made the handling of these sacred funds a separate, and it became, a large business. However, in the meantime, the rule was discretionary and was not applied in every case, not only on account of the high standing of some counsel, but of the business ability of the next friend of the infant. In all instances, however, the court regulated the compensation to be paid to counsel, which is the crux of the problem.

Now the crafty "ambulance chaser," as might have been expected, soon set about discovering a way around this formidable barrier of the court. Order XXII, Rule 15, only authorized the judge to act "at or after the trial," but not *before the trial*. The more venal of the tribe promptly brought about a compromise of the case *without a trial* and thus circumvented the control of the judge over the fund and the compensation, whereupon the poor infant or "person of unsound mind not so found by inquisition" was, if possible, placed in a more unfortunate position than before. With

characteristic vigor the Rule Commission acted.

The first effort in 1905 to correct the weakness, by amending Order XXII, Rule 15, proved futile because, according to Samuel Rosenbaum, it "provided no means by which the court could interfere of its own motion." In 1909, another amendment seemed to have made it fairly operative, but the determination of the judges to wipe out the abuse may be inferred from the following amendments reported by Sir Willes Chitty (Yearly Practice 1921, p. 330). The former rule 15 (R. S. C., Aug., 1909, Rule 2) amended R. S. C., July, 1910, Rule 1, and July, 1912, Rule 1, was annulled and a new rule substituted therefor, dated May 20, 1914 (1914, W. N. Pt. II, p. 263). The sanction of a court or judge if required, before or after the trial, must be obtained *by a summons for the purpose*. At the trial it can be given by the judge and embodied in the Associate's certificate." Obviously the object of this precaution was publicity. It made a matter of record the reasons for surrendering the infant's money to counsel, or its parent, instead of to the Public Trustee. Little room was left for the possibility of arbitrary or lax judicial conduct. But let us have the rule itself which is in these words (Chitty, *supra*):

"In any cause or matter in the King's Bench Division in which money or damages is, or are claimed by, or on behalf of an infant or a person of unsound mind not so found by inquisition, suing either alone or in conjunction with other parties, no settlement or compromise, or acceptance of money paid into Court, whether before or at, or after the trial, shall, as regards the claims of any such infant or person of unsound mind, be valid without the sanction of the Court or a Judge, and no money or damages recovered or awarded in any such cause or matter in respect of the claims of any such infant or person of unsound mind, whether by verdict or by settlement, compromise, payment into Court or otherwise, before or at, or after the trial, shall be paid to the next friend of the plaintiff, or to the plaintiff's solicitor, unless the

Court or a Judge shall so direct. All money or damages so recovered or awarded shall, unless the Court or a Judge shall otherwise direct, be paid to the Public Trustee, and shall, subject to any general or special directions of the Court or a Judge, be held and applied by him, in such manner as he shall think fit for the maintenance and education, or otherwise for the benefit of such infant or person of unsound mind."

As a natural sequence, funds rapidly accumulated in the registry of the courts, though that was not at all the object of the "anti-ambulance" project. It was a natural result of efficacious administration. Thereupon the practical English mind right away set about relieving the judges by creating a "Public Trustee" referred to above to administer all public funds, the safety of which was to be guaranteed by the government. It is analogous to the office of state or city treasurer, except that safety is assured in the States by a fidelity bond. This, of course, was done by an Act of Parliament and it was enacted in 1906 (6 Ed. VII, Ch. 55). This new official, while vested with the necessary power, did not at first take over the funds in the registry of the courts, for the careful judges wished for a demonstration of the practicability of the Trustee's work in so sacred a matter. In three years they were satisfied. In 1909, the Masters of the King's Bench Division (of whom we shall later speak) strongly commended the new office and its administration. The necessary amendment to the rules followed and is still the law. Funds now instead of being lodged in the registry of the court are paid into the treasury of the Public Trustee, under suitable direction.

The effect of its operation has been little short of marvelous. The Trustee makes an annual report, not only of his financial conduct, but of all his activities and the results. It was not convenient to obtain the latest report, but one given by Mr. Rosenbaum (p. 171) and taken from 59 Solicitors Journal, 408 (April 17, 1915) will suffice. "More than seven hundred such funds have been paid over to the Public Trustee, and

he has still in hand six hundred and fifty cases, the benefits belonging to upwards of one thousand infants!" Now, while the amount and number involved is impressive, the character of the work done and the number of dependent aided is more so. "It should," said Mr. Stewart (the Public Trustee) "be borne in mind that the greater number of these children are handicapped by physical injuries which are often of a permanent and serious nature. It will be realized that the exercise of the Public Trustee's discretion in each individual case, as regards the application of the money in such a way as to secure as far as may be the acquisition of a skilled trade or form of employment, such as to make them self-supporting before attaining their majority, and receiving the balance of their funds, is a matter of exceptional importance."

So, two commendable objects have been achieved, each of premier importance. The first is the complete wiping out of the "ambulance chaser" by depriving him of control over the funds of the ignorant and helpless from whom he took his ill-gotten gains. The second is the stable provision made for caring for and educating children and the helpless out of the very funds directed by law and intended by the jury to be paid by the defendant for that purpose. Could anything offer a stronger appeal to the American lawyer or the American charity worker?

The creation in America of a "Public Trustee" may not at first be necessary, but let us hope that funds will so increase as to demand the special service of such an official. But the control of the ambulance chaser is necessary. In the meantime, the American courts can see to the investment of the funds, as they do now, in thousands of other cases. There are some, but mighty few, bad judges in the United States. But the percentage in the number, as compared with the spawn of the ambulance chasers, is negligible. In the meantime, ambulance chasing will cease and the guilty will become respectable or leave the Bar; the maimed

will receive their just due; the wiping out of unethical conduct will elevate the administration of justice and will purify the atmosphere about the courts. Last, the innovation will increase the faith of the people in their judges and lawyers. If it be possible in England to prevent ambulance chasing, by controlling the proceeds of judgments in damage suits, who is it that will face his people and say it is not possible in America?

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

PROOF REQUIRED TO SHOW THAT VEHICLE USED IN ILLEGALLY TRANSPORTING LIQUOR WAS USED WITHOUT OWNER'S KNOWLEDGE IN ORDER TO AVOID A FORFEITURE.—The federal courts are kept busy condemning automobiles used for the purpose of illegally transporting intoxicating liquor. Many people have not learned that to lend a friend one's car to transport liquor is to lose the car. And the burden of proving an absence of intent that the car shall be so used is upon the owner of the car. In the recent case of *United States v. One Shaw Automobile*, 272 Fed. Rep. 491, the District Court (N. D., E. D., Ohio) held that an owner of an automobile, seized while illegally used for the transportation of liquor, does not show good cause why it should not be forfeited, unless he not only proves clearly and satisfactorily that it was used without his knowledge and consent, and in excess of any authority conferred by him on the person using it, but also removes any imputation of negligence by intrusting the vehicle to another under circumstances from which a reasonable person would have foreseen it was to be illegally used.

The strange thing about this case is that the automobile belonged to a taxi company and the only evidence of the intent of the company that its machine should be used in transporting liquor was that a call was received from a customer to send a taxi to a certain saloon in Pittsburg to take certain parties thence to Cleveland. The company's agent made no inquiries as to the character of the trip and

did not know that certain sacks put in the car contained liquor. The Court said:

"I do not hold that an automobile livery is to be held liable in all cases, if a driver, contrary to instructions, devotes one of its cars to the illegal transportation of intoxicating liquor. In the instant case, the facts and circumstances are that the owner's dispatcher or superintendent sent its driver to premises used for saloon purposes; that he permitted the driver, after being informed that the car was destined for Cleveland, to engage in that enterprise without inquiry or investigation; that full authority was conferred on the driver to engage or refuse to engage in the enterprise, using his own judgment as to whether the transaction was legal or illegal; and that no precautions were taken at any time to ascertain whether or not the transaction was legal or illegal. The distance to be traveled each way is approximately 150 miles. The expense of a round trip, at 40 cents a mile, would be approximately \$120. It is difficult to believe that this is a simple, ordinary transaction in the usual course of business. It was then a matter of public notoriety that whisky was being transported, not only in suit cases and trunks upon railway trains, but upon the public highways in automobiles and trucks. To exonerate the owner on a showing merely that instructions had been given to its drivers not to engage in the illegal transportation of intoxicating liquors, notwithstanding the drivers were intrusted with full authority to decide whether the transaction was legal or illegal, would open wide the door to collusion and evasion of the law."

THE RIGHT OF A STATE TO REFUSE RECOGNITION OF A FOREIGN DIVORCE DECREE.—As to decrees of divorce, where only one of the parties is before the court, the states of this Union are as foreign to each other as each is to Japan or China or England, or any other foreign land. This is the ridiculous and intolerable situation created by the Supreme Court in the Haddock case, one of the most puerile opinions ever handed down by that honorable tribunal. Under that decision the states, if they see fit, on mere principles of comity, and not on any constitutional obligation to render due faith and credit to the judicial decrees of a sister state, may recognize a decree of divorce based on substituted service or may utterly ignore it and proceed against the spouse securing the divorce as if the decree had not been rendered and subject him and his estate, as well as other persons or innocent children who have rightfully assumed or acquired family relationship with him, to personal shame and pecuniary loss. For some time New York was the only state that took advantage of the deplorable blunder of the Supreme Court, but now Massachusetts

falls in line and holds that a former wife living in Massachusetts, but divorced in Illinois, may enjoy a widow's share in the deceased former husband's estate. *Parmelee v. Hutchins*, 131 N. E. 443.

In this case there was no question as to the bona fides of the husband's domicile in Illinois. He went there on business without intending to secure a divorce. Before his removal to Illinois his wife had separated from him on what she thought was proper grounds. After living in Illinois for several years, the husband secured a divorce on substituted service, which so far as the opinion of the Massachusetts court shows was perfectly valid in Illinois. The Massachusetts court says something about a valid defense to husband's petition which the wife could have made if she had known of the proceedings. But this, it seems to us, is wholly beside the mark. The question is, Did the Supreme Court of Illinois render a decree binding and valid in Illinois? If so, why should it not be binding in Massachusetts? If this is not true, then the United States is no longer a nation, so far as the question of divorce is concerned, but is simply a bundle of states very loosely tied together. The opinion of the Massachusetts court is a mere shameless reliance on the Supreme Court's *faux pas* in the Haddock case, and offers no apology or excuse for ignoring the Illinois decree. The Court said:

"The court of Illinois not having matrimonial jurisdiction and not having jurisdiction of both parties, could not make a decree which would fall within the full faith and credit clause of the Constitution of the United States (*Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794; *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347). But other states, if they see fit, on principles of comity, may recognize a foreign decree of divorce when such decree has no extraterritorial force by reason of Art. 4 of the Constitution of the United States (*Haddock v. Haddock*, *supra*; *Perkins v. Perkins*, 225 Mass. 82, 113 N. E. 841, L. R. A. 1917B, 1028)."

The widow in this case, it should be noted, did not reap the result of the court's reasoning, for she married after learning of the divorce granted to her husband in Illinois. In accordance with the familiar rule that a remarriage with knowledge of the fact estops the party entering into it from denying the validity of the previous divorce, the Supreme Court was compelled to hold that she could not take advantage of the invalidity of the Illinois decree of divorce.

DECLARATORY JUDGMENTS*

If the parties could find out their rights before acting, their action would conform most frequently to their rights. If counsel had means of knowing with reasonable certainty the rights of their clients, their clients would be saved loss by acting within their rights. It is an accepted principle that the courts' aid may not be invoked until a wrong is committed nor unless the judgment is to be enforced by process for immediate relief. The principle is tersely stated in *Woods v. Fuller*:¹

"A court of equity will not take jurisdiction unless it can afford immediate relief. * * * It must be borne in mind that the decree of a court of equity, and not its opinion, is the instrument through which it acts in granting relief. However sound and clear such opinion may be, as an abstract proposition of law, yet if the principle it declares can not be carried into effect by a decree, in the case in which it is given, it is wholly valueless, and an idle and nugatory act."

The courts have "refused to allow parties to appear in court, except under conditions which permit a display of force by the judicial arm of the state."

The wisdom of such condition of the law is well doubted and there is a persistent effort to give relief to those who have controversies without the necessity of legal combat incident to the ordinary lawsuit.

In an interesting and able paper read before the Tennessee Bar Association (1920) by Mr. Gates, the principle is thus stated:

"It has been urged, and I think wisely, that frequently parties desire to obtain a mere declaration of right without seeking the coercive relief to which they might be entitled, and that such a procedure psychologically makes for better

understanding between business men. I think we can readily appreciate that ordinarily parties to contracts would much prefer a mere declaration of their rights thereunder than to await a breach and the seeking of coercive relief by one or the other. The antagonisms that are engendered in a bitterly fought lawsuit usually leave their scars. On the other hand, there is probably less bitterness occasioned in a proceeding in which the court is called upon to merely settle disputes or misunderstandings between parties over the construction of the contract or over the relative rights of the parties. It would enable the profession to remove the uncertainty and the doubt from matters that are being presented constantly to it. It would enable a party to obtain a determination of his rights without waiting for the other to become the aggressor. And there are many other arguments that may be advanced on behalf of this new departure."

And Prof. Sunderland, of Michigan University,² announces the principle thus:

"Every case may by this means become in appearance, at least, a friendly suit. There is no doubt that the personal animosities developed by litigation are serious drawbacks to the usefulness of the courts. To sue is to fight, and fights make endless feuds. Parties hesitate to resort to the courts because they shrink from a state of war with their neighbors or business associates. * * * When you ask for a declaration of right only you treat him as a gentleman."

Declaratory judgments in one form or another have been authorized in the English Courts beginning with 1859. In that year the practice of the High Court of Chancery was amended so as to provide that "no suit in the said court shall be open to objection on the ground that a mere declaratory decree or order is sought thereby and it shall be lawful for the court to make binding declarations of rights without granting consequential relief."³

In 1873 the Judicature Act was passed and in 1883 Rule 5 of Order 25 was

*This article by Judge Gordon will be found interesting as constituting a resume of recent discussions of this important reform of judicial procedure.—Ed.

(1) 61 Md. 457.

(2) 54 American Law Review, No. 2, p.173.

(3) 15 and 16 Vic., chap.86, sec. 50.

promulgated and it provided: "No action or proceeding shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not." It will be observed that in this provision the remedy is not confined to the Court of Chancery.

The State of Rhode Island,⁴ adopted a provision as follows:

"No suit in equity shall be defeated on the ground that a mere declaratory decree is sought; and the court may make binding declaration of right in equity without granting consequential relief."

And later, by statute it is provided as follows:

"Subject to rules any person claiming a right cognizable in a court of equity under a deed, will or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same effects such right, and for a declaration of the rights of the persons interested."

And in the State of Connecticut, General Statutes 1918,⁵ provides:

"An action may be brought by any person claiming * * * any interest in * * * real or personal property * * * against any person who may claim * * * any interest * * * adverse to the plaintiff * * * for the purpose of determining such adverse * * * interest and to clear up all doubts and disputes and to quiet and settle the title to the same."

The English Act is set out, with notes and citations of cases under each section, in *Central Law Journal*, Volume 91, page 264. In that article it is said:

"The American Bar Association at its last session in St. Louis on August 27, 1920, after an interesting debate and under the persuasive eloquence of Mr T. J. O'Donnell, of Denver, Colo., and Hon. Charles E. Hughes, of New York, voted in favor of a resolution asking Congress to grant to the federal courts jurisdiction to 'declare' the

rights and other legal relations on written request for such declaration, whether or not further relief is or could be claimed, and such declaration shall have due force of a final judgment'."

There seems to have arisen in the last few years a new interest in the principles set out in the English Act and applied in the English cases based upon the Act, so that we have legislation in several States on declaratory judgments—Michigan Act 1919, Wisconsin Act same year, Florida Act the same year, Kansas Act 1921.

At the last Conference of Commissioners on Uniform State Laws, held in St. Louis, August of last year, at which nearly all of the States of the Union were represented (Kentucky, I regret to say, being one of the few not so represented), the Commission had under consideration the principle of declaratory judgments. An interesting report was made and a tentative draft of a law to be submitted to the several States was approved by the commission and passed to the next session, which meets with the American Bar Association at Cincinnati in August of this year, for revision and review.

An able article reviewing this tentative draft, together with citation of authorities by Prof. Edwin M. Borchard of Yale, will be found in the *Harvard Law Review*.⁶

There have been many adjudications under the declaratory judgment enactments. The practice has grown in favor in the English courts. In one volume of the reports for the year 1919 it is noted that over half the cases reported were declaratory judgments, and in a volume for 1917 an examination of the cases decided on appeal discloses that sixty-seven per cent were declaratory actions. This of course, takes no note of the vast number of cases that were decided in the lower courts and not appealed, and it has been said that it may be fairly assumed

(4) General Laws 1909, chap. 289, sec. 19.

(5) Sec. 5113.

(6) May, 1921, vol. 34, No. 7, p. 697.

that the lower court decisions were more numerous in proportion because it is reasonable to suppose that declaratory actions are less likely to be appealed than cases where coercive judgments are rendered.

In this article it is possible to select and note only a few cases illustrating the principles of the declaratory judgment.

In *Zinc Corporation v. Hursch*,⁷ there is a declaration that a contract by an Australian firm to supply their whole output of zinc to a German resident in Germany was wholly dissolved by the declaration of war and not merely suspended, so that the Australian knew he was free to dispose of his product as he saw fit.

In *Stevenson v. Aktiengesellschaft*⁸ there was a partnership between an Englishman resident in England and a German resident in Germany for the manufacture in England of a certain article. The profits from the manufacture of this article rose materially after the outbreak of the war, and the Englishman desired to know what the rights of his German partner were in those war profits. He obtained a declaration that the partnership with an alien enemy was completely dissolved upon the outbreak of the war and that the enemy had no share in the profits subsequently earned. Of course, it would follow that he was liable for no losses.

Most English leases contain a clause requiring the lessor's consent to sublet, but providing that such consent should not be unreasonably withheld. Very frequently a lessor will attempt to impose unreasonable conditions upon giving consent, such as increased rent or a money payment, and the lessee will then bring an action asking merely for a declaration that the landlord's consent is being unreasonably withheld. Such a declaration

was made in *Young v. Ashley Gardens*,⁹ where Cozens-Hardy, L. J., said:

"If we refused a declaration here the lessee's property would diminish in value, as his assignee would run the risk of being turned out by the lessor. I cannot imagine a more judicious or beneficial exercise of the jurisdiction to make a declaratory order."

In the case of *Societe Maritime v. Venus S. S. Co.*,¹⁰ the facts are: A contracted with B to load 75,000 tons of ore a year on B's ships for a period of years. When the contract had still 1½ years to run, C informed A that B had assigned his contract to C and that C would claim the benefit of it. C tendered a ship to be loaded and A refused to load it. A then brought an action for a declaration that he was not bound to load C's ships under the contract with B. Channell, J., in giving judgment, said:

"In reference to a mercantile transaction of this sort parties are entitled now to come into court and say, 'It is important to us in reference to this contract, which has a year and a half to run, to know whether we are bound by it or not.' * * * They are not entitled to come and ask a court of law for an opinion upon a speculative or academic question; but showing the necessity of a decision upon it, I think they are entitled to a declaration as to whether or not the contract is binding upon them. They are not bound at their peril to refuse to perform it and then to be liable for heavy damages for not performing it for the space of the next year and a half."

In *Thompson Bros. & Company v. Amis*,¹¹ a dispute arose between the parties over the proper construction of the contract of employment whereby the plaintiffs employed the defendant. The defendant by way of compensation was entitled to receive a sum equivalent to a certain share of the net divisible profits of the firm. The plaintiffs sought to deduct from the return for excess profits made by them the real remuneration paid to

(7) 1 K. B. 541.

(8) 1916, 1 K. B. 763.

(9) 1903, 2 chap. 113 C. A.

(10) 9 Commercial Cases 289 (K.B.D., 1904).

(11) 1917, 2 chap. 211.

the defendant. This the surveyor of taxes declined to allow. The plaintiffs gave notice of an appeal. The defendant insisted upon a settlement under his contract. Thereupon the plaintiffs sought a declaration that they were entitled to recover from the defendant as and when the return was paid, by way of excess profits duty in respect of the increased remuneration of the defendant for the period in controversy. A declaration was made as required. In other words, the question with which the parties were confronted was whether or not the manager's additional compensation ought to be estimated before or after the deduction of the excess profits tax. The plaintiffs were not obliged to wait until there had been a demand made on them by the manager for the larger compensation, but obtained from the court a declaration as to the proper basis of computation.

In *Mayor of Bayonne v. East Jersey Water Company*,¹² the city of Bayonne had a contract with the New York and New Jersey Water Company to supply it with water and the latter company in turn obtained its water from the East Jersey Water Company. The New York and New Jersey Water Company sold its plant and assigned its contract with the East Jersey Water Company to the city of Bayonne. Immediately thereafter the East Jersey Water Company notified the city that at the expiration of a certain date it would no longer supply the city with water, assigning as reason therefor that it had no contract with the city and that the assignment of the New York and New Jersey Water Company relieved it from further liability: Thereupon the city filed suit for an injunction and a declaration of rights. And out of this arose three questions for determination: (1) Did the purchase by the city terminate the obligations of the East Jersey Water Company; (2) If not ended by the

purchase, will it end on September 6, 1919; and (3) if not terminated by the purchase or if it does not terminate on September 6, 1919, but continues until June 21, 1929, is the East Jersey Water Company under any obligation to supply Bayonne with water after that date, and if so, then is its obligation to supply water only for municipal purposes or also for resale to outside consumers? And the court proceeded to settle the rights of the parties under the contract, not only the right to an injunction presently, but adjudged the rights, some of which would only arise in the future. Through this means a complete disposition was had, once for all time—all of the matters in controversy being judicially settled and all doubts or questions of construction that might arise over the contract resolved, and the parties knew what their respective rights and duties were.

The Michigan statute was held unconstitutional in the case of *Anway v. Grand Rapids Railway Co.*¹³

Anway was a conductor employed by the Grand Rapids Railway Company. The statute prohibited the employment of such employes more than six days in the week, except under certain conditions of emergency, and fixed a penalty. Anway desired to work more than six days in the week, and the railway company desired to employ him more than six days. Anway instituted his action seeking a declaratory judgment that if the railway company should employ him to work more than six days in the week that it would not be a violation of the law, in effect holding unconstitutional the Act against such employment. A labor union, of which Anway was not a member, interpleaded and contended that the statute should be construed to prevent plaintiff from working more than six days in the week. From a declaratory judgment up-

(12) 108 Atl. 121.

(13) Michigan Supreme Court, Sept., 1920; 179 N. W. Reporter, 305, 211 Mich. 592.

holding plaintiff's contention an appeal was taken to the Supreme Court. So much of the Michigan statute with reference to declaratory judgments above referred to, but not quoted, as was brought in question were Sections 1 and 3, as follows:

"Section 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby and the court may make binding declarations of rights whether any consequential relief is or could be claimed or not, including the determination at the instance of anyone claiming to be interested under a deed, will or other written instrument of any question of construction arising under the instrument and a declaration of the rights of the parties interested."

"Section 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief for an order directed to any party or parties whose rights have been determined by such declaration to show cause why further relief should not be granted forthwith upon such reasonable notice as shall be prescribed by the court in such order."

The opinion reversing the case and holding the Act unconstitutional was by a divided court, the Chief Justice for himself and five of his associates holding the Act unconstitutional, and Judge Sharpe for himself and one other member of the court held to the contrary. The opinion concludes that the duties imposed upon the court under the statute are non-judicial in their nature; that the question in the case presented was a moot question; that the Legislature had no right to impose upon the court any duty not embraced in its judicial power; that it will not determine moot questions; that it is not an exercise of judicial power where a judgment rendered is not to be enforced by the court. It will be readily seen from the statement of fact that there was no controversy between Anway and the railway company and therefore it might well

be said that the question was a moot question, and under this state of case the court could well have reversed and directed a dismissal of the petition. It was not necessary to decide the question of the constitutionality of the declaratory judgment statute in that case. No party to the record raised that question. The court, however, invited the Attorney General and Prof. Sunderland, who had written the very able argument above referred to, published in *American Law Review*,¹⁴ entitled "The Courts as Authorized Legal Advisers of the People," to appear and brief the case. The court was manifestly unduly impressed with the title of that article by Prof. Sunderland and said in the course of the opinion that the courts should pause long enough to consider fully the constitutionality of the act before it should assume to become the adviser of three millions of people in the State of Michigan.

A large number of authorities are cited in support of the contention that the court will not decide a moot question. Those authorities, it seems to me, are not applicable to the question before the court. If there were no controversy between the parties appealing to the court, any decision of the court would be a decision of a moot question. It is further argued strenuously by the court in its opinion that it was without the power of the Legislature to impose upon the court the duty to decide questions that did not arise in a controversy between contending litigants, and further takes the position that unless the court in rendering the judgment is authorized also to give consequential relief that the question is not one that the court has jurisdiction to decide. In the minority opinion it is very properly said:

"Herein lies the distinction between the declaratory judgment and moot cases or advisory opinions. A declaratory judgment is a final one forever binding on the parties

(14) Vol. 54, No. 2, p. 161.

on the issues presented. The decision of a moot case is mere dictum, as no rights are affected thereby; while an advisory opinion is but an expression of the law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between the interested parties."

In criticism of the majority opinion it is said that the court does not recognize the distinction between a declaratory judgment which binds the parties and a mere advisory opinion or a decision of a moot case.

The majority of the court quoted liberally from the opinion in *Muskrat v. United States*,¹⁵ and says:

"This case should forever put at rest this question. It is absolutely decisive of the question before us."

In the *Muskrat* case it appears that *Muskrat* and others, on behalf of themselves and other Cherokee citizens, were authorized to institute proceedings in the Court of Claims with a right of appeal to the Supreme Court.

" * * * to determine the validity of any Acts of Congress passed since said Act of July 1, 1902, in so far as said Acts, or any of them, attempted to increase or extend the restrictions upon alienation, incumbrance or the right to lease allotments of land of Cherokee citizens or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in said Act of July 1, 1902."

The proceedings under that Act were instituted and brought to the Supreme Court, the court holding that the Act of March 1, 1907, above quoted, by which the Supreme Court was authorized to determine the validity of various acts having reference to the Indian tribes was in excess of legislative authority and that Congress had no power to confer power other than judicial power upon the court, or to require of it other than judicial action; that the proceedings there under consideration did not require the

exercise of judicial power and ordered the dismissal of the proceedings. The Supreme Court said in that opinion:

"Judicial power is the power of the court to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision (*Miller Const.* 314.) The exercise of judicial power is limited to cases and controversies. Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution the power to exercise it is nowhere conferred."

It will be noted that in that case the parties whose interests would be affected by the decision of the Supreme Court were in large numbers not before the court and the statute imposing upon the court the duty to determine the rights of the parties was in effect the duty merely to pass upon the constitutionality of a congressional enactment without the parties being before the court. This the court held was beyond the power of Congress. As to the *Muskrat* case, ex-Justice Charles E. Hughes, now Secretary of State, in a supplemental statement to the recent report of the committee having the matter of declaratory judgments in charge, says:¹⁶

"It is true that the *Muskrat* case dealt with the validity of an Act of Congress, but the ground of the decision was the fundamental one that the judicial power extended to 'cases and controversies,' that is, that the judicial power was the 'right to determine actual controversies arising between adverse litigants duly instituted in courts of proper jurisdiction.' (219 U. S., p. 361.) It was not because the question was the determination of the validity of an Act of Congress, but because this question did not arise in an actual controversy, that the court found itself without power to determine it. Had there been an actual controversy, the question of the validity of an Act of Congress, or any other question properly brought before the court, could have been determined. But in the absence of an actual controversy, neither that question nor any other could be properly determined by the court. It was pointed out that the power

(15) 219 U. S. 346.

(16) *Central Law Journal*, Vol. 91, p. 435.

to decide upon the constitutional validity of a statute existed only when the court was called upon to determine an actual controversy. It was said that the whole purpose of the law there in question was to determine the validity of the class of legislation, not in a suit arising between parties concerning a property right necessarily involved in the decision, but in a proceeding against the Government in its sovereign capacity. The United States was to be made a defendant, but it had no interest adverse to the claimant's, the suit being brought solely to determine the validity of the legislation in question."

"I do not think, therefore, that it distinguishes the Muskrat case to say that it related to the determination of constitutional questions, for this fails to state the ground upon which the court found itself unable to determine the constitutional question. I think that the paragraphs relating to the Muskrat case should be changed, and particularly that portion which states the distinction between the Muskrat case and the proposed legislation. I do not think it should be said that probably legislation, conferring a power to determine the validity of an Act of Congress, should be within the rule in the Muskrat case. The question will be whether there is a 'case' or actual controversy,' and if there is not, it may be assumed that the statute would be held to be invalid whether or not it extended to the determination of the constitutional questions. The point of distinction, it seems to me, should be, and it is sufficient to state, simply that the proposed legislation is intended to deal only with actual controversies and proposes that where there is an actual controversy between litigants the court may render a declaratory judgment."

I think it a fair conclusion that where there is an actual controversy and the parties are before the court, the courts may determine such controversy under legislative enactment so authorizing, although consequential relief is not asked.

By comparing the sections of the Michigan Act with those of the Kansas Act, it will be observed that in the Michigan Act it is not expressly stipulated that the declaratory judgment is limited to actual controversies, while Section 1 of the Kansas Act, passed subsequent to the Michigan Act

and after the decision in the Anway Case, begins "In cases of actual controversy."

Such judgments are now rendered by the courts without express statutory authority and without necessarily being enforced by process of the court, such as a judgment to quiet title, a judgment declaring marriages void or valid, a judgment construing wills or other written instruments, confirming the validity of municipal bond issues, a judgment directing an executor or trustee in administering his trust, a judgment on appeal by the appellate court in a criminal case reviewing the decisions of the trial court in admitting and rejecting evidence and in giving and refusing instructions in a case where there is a mistrial.¹⁷ And in a case where there has been an acquittal the court can and will declare the law.¹⁸

A case worthy of note is *Barth, Mayor, v. McCann, Police Judge*,¹⁹ In 1906 the question of closing the saloons on Sunday was acute in Louisville. Warrants had been taken out against various saloon keepers charging violation of Section 1303 of the Kentucky Statutes, providing:

"Any person who shall on Sunday keep open a barroom or other place for the sale of spirituous, vinous or malt liquors, or who shall sell or otherwise dispose of such liquors or any of them, shall be fined not less than ten nor more than fifty dollars for each offense."

McCann, police judge, sustained demurrers to the warrants on the ground that the statute was unconstitutional, amongst other grounds. The mayor, under the provision of the statute that it should be his duty to see that the ordinances and laws of the city were enforced, filed in the Court of Appeals his petition for a mandamus in the name of the Commonwealth in his official capacity as relator, seeking to have a writ issued against the police judge, compelling him to hear and try the writs. The defend-

(17) *Commonwealth v. Matthews*, 89 Ky. 287.

(18) *Criminal Code*, secs. 335, 336 and 337.

(19) 29 Ky. L. R. 707.

ant demurred to the petition, claiming that the plaintiff had no legal capacity to maintain the action and the court had no jurisdiction of the subject matter and the petition did not state a cause of action. The Court of Appeals held that it was McCann's duty as police judge to enforce the law, but denied the motion for a mandamus by an equally divided court, three of the judges being of the opinion that the court has the power under the Constitution to award the writ and three of them that it has not such power, and therefore the writ was denied; Judge Cantrill, then a member of the court, being ill and unable to act. Under this state of case the court, not being willing to issue the writ and, it seems, from sheer necessity, made a declaration as to the law and said:

"In view of the importance of the questions involved, we have expressed our views as above indicated, assuming when the judge of the city court in advised by this court that the statute is constitutional, it will be his pleasure to enforce the law and discharge his duty faithfully in upholding the mayor and police of the city in the efforts to do so."

The effect of the advisory opinion was that the constitutionality of Section 1303 of the statute and the right of the Commonwealth and of the city to have the statute and ordinances against the sale of liquor on Sunday enforced and the right to keep open saloons or sell liquor on Sunday were no longer undetermined questions.

A frequent confusion of decisions upon law questions is found. It is most difficult for counsel to advise his client as to what the courts will hold upon the state of case submitted to him by his client. He examines the authorities and may think that he finds decisions that will warrant him in advising his client and yet he knows that in taking his advice and acting upon it, the client takes a chance as to what the ultimate result may be. Mr. Bigelow, in his work on Torts,²⁰ says:

"What is meant by 'legal right'? The specific answer is whatever the judge, or

judge and jury, in a particular case may decide. As a matter of fact, most cases in the higher courts are cases in which the judges must decide the questions of right. Such, indeed, is the complexity of human affairs that even 'natural' rights so called and rights already strictly defined may be drawn in issue so as to raise a question which must wait upon the decision of the judge in regard to the law."

How often a man will forego a claim of what he considers a legal right, rather than chance the decision of the court upon it after long and expensive litigation. A declaratory judgment would state the right in advance.

The declaratory judgment takes away no right of procedure now authorized. It rests within the sound discretion of the court to award it or not to award it. Of course, this discretion is a judicial, and not an arbitrary discretion.

The Michigan and the Kansas Statutes both state, it seems to me, the true ground for the declaratory judgment, that the statute shall be "liberally construed and liberally administered with a view of making the courts more serviceable to the people." Its discussion and consideration can well be made turn upon this principle. It should not be considered in the light of whether or not it will increase or decrease litigation. It is not evident that it will do either. The courts are created to administer justice in order to preserve the well-being of society. They are but instrumentalities created by the State for this purpose. The bar are officers of the court to aid the court in this high purpose, and I can well see that to declare the rights of parties before either has breached a right of the other would call for less work from the courts than to settle the disputes after the breach has occurred and losses on the one side or the other have been sustained.

THOMAS R. GORDON.

Louisville, Ky.

(20) 8th Edition, p. 4.

LIBEL AND SLANDER—PRIVILEGE.

McKENZIE v. WM. J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

183 N. W. 516

Supreme Court of Minnesota, June 24, 1921.

(Syllabus by the Court.)

The fact that the slanderous language was incidentally overheard by persons in an adjoining room was not such a publication as would remove it from the protection of the privilege.

TAYLOR, C. Action for slander in which the trial court directed a verdict for the defendant, and the plaintiff appeals from an order refusing a new trial.

Plaintiff had been in the employ of the Minneapolis branch of the defendant, and shortly after he left their employ defendant claimed that he had overdrawn his account, and sent for him to come to the office. He went to the private office of Mr. Rogers, the manager of the Minneapolis branch, where he found Mr. Rogers and William J. Burns, the president of the defendant corporation. He charges that in the controversy that ensued between himself on one side and Mr. Rogers and Mr. Burns on the other, concerning his account, Mr. Burns called him a "damn thief." Although Mr. Burns and Mr. Rogers deny that this language was used, there was sufficient evidence on the part of plaintiff to make this issue a question for the jury.

Plaintiff concedes, in effect, that the circumstances were such that the conversation between the parties during this interview and the communications then made were qualifiedly privileged. The statement having been made on a privileged occasion, plaintiff could not recover unless he proved actual malice on the part of Burns; that is, that Burns made the statement from ill-will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff. *Peterson v. Steenerson*, 113 Minn. 87, 129 N. W. 147, 31 L. R. A. (N. S.) 674; *Hansen v. Hansen*, 126 Minn. 426, 148 N. W. 457, L. R. A. 1915A, 104; *Froslee v. Lund's State Bank*, 131 Minn. 435, 155 N. W. 619; *Patmont v. International C. M. Ass'n*, 142 Minn. 147, 171 N. W. 302.

It seems quite clear that, in consequence of an error of the bookkeeper in failing to charge him with a payment previously made, plaintiff had been paid more salary than was actually due him. Burns and Rogers insisted that he should return the overpayment. During the

discussion it appeared from plaintiff's own statement that in his expense account he had charged defendant with larger amounts paid for meals than he actually paid for them. He claimed, however, that he had the right to do this so long as the amounts charged did not exceed the amounts which he was allowed to spend for such purpose. These facts appear from his own testimony. The defamatory language is claimed to have been used during this discussion which according to plaintiff, became somewhat heated. It took place in the private office of the manager, and the only persons present were the plaintiff and Burns and Rogers. Burns and plaintiff were entire strangers, never having met before. We think that plaintiff failed to sustain the burden of proving that, in making the statement, Burns was actuated by ill-will and malicious motive, or that he made it causelessly and wantonly for the purpose of injuring plaintiff in his feelings or character. It was a remark made on a privileged occasion, to plaintiff himself, during a heated dispute, and there was some foundation for the charge.

There was evidence that the statement was overheard by other employes of defendant in adjoining rooms; but the conversation being privileged, the fact that it was incidentally overheard by persons in an adjoining room was not a publication of the nature or extent which would remove it from the protection of the privilege.

Hebner v. Great Northern Ry. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387.

Order affirmed.

NOTE.—*Conversation Overheard by Third Person as Affecting Privilege Within Law of Slander.*—In a note on this subject in Ann. Cas. 1917E, 699, it is said: "It is generally held that where slanderous statements are made by one in good faith to another, in order to protect the speaker's interests, or the corresponding interests of another, in a matter in which both parties are concerned, the qualified privilege attaching thereto is not defeated by the fact that such statements are incidentally overheard or brought to the notice of third parties who are not immediately interested in the matter." Among others, the following cases are cited: *Southern Ice Co. v. Black*, 136 Tenn. 391, 189 S. W. 861, Ann. Cas. 1917E, 695; *Morton v. Knipe*, 128 App. Div. 94, 895, 112 N. Y. Supp. 451, 455; *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S. W. 462, 127 Am. St. Rep. 627; *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 261; *Fresh v. Cutter*, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; *Sheftall v. Central of Georgia R. Co.*, 123 Ga. 589, 51 S. E. 646; *Conrad v. Roberts*, 95 Kan. 180, 147 Pac. 795, L. R. A. 1915 E, 131; *Philips v. Bradshaw*, 167 Ala. 199, 52 So. 662.

The imputation of unchastity to a woman by her physician and in the presence of a third person who was there by the special procurement of the plaintiff, was held to be privileged. *Bruce v. Curtis*, 38 App. Cas. (D. C.) 304, Ann. Cas. 1913 C, 1070, 38 L. R. A. (N. S.) 69.

There is no privilege, however, if the defendant purposely selects an occasion to make the slanderous statements when a third person is present. *Kruse v. Rabe*, 80 N. J. L. 378, 79 Atl. 316, 33 L. R. A. (N. S.) 469; *Field v. Bynum*, 156 N. C. 413, 72 S. E. 449.

While statements made by the defendant at a shareholders' meeting were privileged, the privilege was lost by the presence of reporters who were there by defendant's express invitation. *Parsons v. Surgey*, 4 F. & F. (Eng.) 247.

So, statements made by an attorney to his client in such a loud tone of voice in a semi-public place within the hearing of third persons, were not privileged. *Kruse v. Rabe*, 80 N. J. L. 378, 79 Atl. 316, 33 L. R. A. (N. S.) 469.

CORRESPONDENCE.

ANSWER TO "A LEGISLATIVE PUZZLE."

Editor Central Law Journal:

I have read in your Journal of August 12, 1921, the article entitled "A Legislative Puzzle," and solve it thus. The five districts, each of them, must be laid off in triangular form, the sharp angles meeting at a central point.

If counties or districts are adjoining when they touch only at their corners, the cities of New Mexico can, and must be, districted as above suggested.

An old lawyer of this city said to me when the puzzle was presented to him: "I have seen somewhere in the books one or more judicial decisions, construing a statute on the subject of the change of venue of suits, the statute requiring the change to be from the county where suit brought to 'an adjoining' county, holding that two counties are 'adjoining' when their corners merely touch, like this

County A	County B
County D	County C

Under such decisions Counties B and D are adjoining counties. The courts must hold the New Mexico Statute to have some meaning and be capable of execution if it be possible to do so, and the districts of cities in that State can be districted as above stated, since the districts are not required to contain the same area.

Puzzle No. 2 it seems to me, may be solved by having the names of candidates residing in each district designated on the election tickets

and requiring each elector to vote for only one and only one candidate, for each district.

Yours truly,

FULTON THOMPSON.

Jackson, Miss.

HUMOR OF THE LAW.

"Here, boy," said the man to the boy who was helping him drive a bunch of cattle, "hold this bull a minute, will you?"

"No," answered the boy. "I don't mind bein' a director in this company, but I'm darned if I want to be a stockholder."—*Cartoons*.

A pompous old gentleman was addressing a gathering of English workmen, and during his remarks he urged them to "be industrious, shun indolence, and remember that sloth is the parent of necessity."

As he paused to let this sink in a man in the rear sang out: "Look 'ere, mister, I've 'eard it said as 'ow necessity is the mother of invention. If so be as it is, then sloth is invention's grandmother, and summat's wrong somewhere."—*Boston Transcript*.

An anecdote the late Chief Justice White told about himself was to the effect that, when he was a rising young lawyer, or perhaps the best-known young lawyer in New Orleans, one of the Judges asked him to defend a man who was unable to retain counsel. Mr. White made a plea for his client, who promptly got a sentence of two years at hard labor. As they were going out of the courtroom a friend of the client said:

"Say, Jim, have you got any money?"

"If I had had any money, don't you suppose I would have employed a lawyer?" replied Jim.

A story of Lincoln's early political life is told in John Wesley Hill's new book, "Abraham Lincoln, Man of God." It seems that in 1846, during a canvass for Congress, Lincoln attended a preaching service of Peter Cartwright's. Cartwright called on all desiring to go to heaven to stand up. All arose but Lincoln. Then he asked all to rise who did not want to go to hell. Lincoln remained still seated. "I am surprised," said Cartwright, "to see Abe Lincoln sitting back there unmoved by these appeals. If Mr. Lincoln does not want to go to heaven and does not want to escape hell, perhaps he will tell us where he does want to go?" Lincoln slowly arose and replied, "I am going to Congress."—*Christian Register*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Aliens—Deportation.**—The deportation of an alien who is found in the country in violation of law, or of the conditions prescribed by Congress, either as to his right to be admitted or his right to remain, is not a deprivation of liberty without due process of law.—*In re Kosopud*, U. S. D. C., 272 Fed. 330.

2. **Army and Navy—Moratorium Act.**—That the federal act is not applicable, even though it be assumed that the plaintiff's equity of redemption was suspended during the period of his military service and for three months thereafter, for the reason that such equity of redemption thereafter fully expired before the institution of the present action, and without any alleged offer or tender made to redeem.—*Olson v. Gowan Lenning Brown Co.*, N. D., 182 N. W. 929.

3. **Bankruptcy—Assignment to Trustee.**—The property of a bankrupt comes to the bankruptcy court in legal effect from him, though he had previously assigned it to a trustee for the benefit of his creditors, so that he can claim exemption in such property under the Bankruptcy Act, notwithstanding his previous transfer of it to the trustee for his creditors.—*In re Dautz*, U. S. D. C., 272 Fed. 349.

4. **False Property Statement.**—The fact that the bankrupt made a statement of his property, which was admittedly false, in order to obtain credit, does not prevent discharge, where the District Court found on sufficient evidence that the statement was not fraudulently made, but was negligently made to one who had full knowledge of the bankrupt's affairs, and who prepared the statement, which was signed by the bankrupt without reading it.—*In re Matthews*, U. S. C. C. A., 272 Fed. 263.

5. **Powers of Liquidators.**—Where a corporation had appointed two stockholders as liquidators to settle its affairs, on dissolution under Acts La. 1914, No. 267, and the provisions of its charter, which did not purport to give the liquidators powers different from those conferred by the statute, the action of the liquidators in thereafter applying to the court for qualification as judicial liquidators is not an act of the corporation, so that an adjudication of bankruptcy cannot be based on such act, where the appointment of the liquidators by the corporation occurred more than four months before the filing of the petition for involuntary bankruptcy.—*Standard W. & C. Co. v. George H. M'Fadden Bros. Agency*, U. S. C. C. A., 272 Fed. 251.

6. **Banks and Banking—Cable Transfer.**—Where defendant bank sold to plaintiff a cable transfer of 7,000 marks to plaintiff's relative in Poland, the money paid became at once the property of the bank, which was under obligation to plaintiff to pay the agreed equivalent in foreign exchange of the amount received by it

to the payee named in the cable transfer.—*Safian v. Irving Nat. Bank*, N. Y., 188 N. Y. S. 393.

7. **Fiduciary Relation.**—In a controversy between a widow and a bank, wherein the bank claimed that it was entitled to the proceeds of life policies on decedent's life, held, that the circumstances and situation of the bank officers and the widow constituted a relation of trust and confidence which imposed upon the bank and its representatives the duty to deal with the widow with utmost frankness, and to inform her that a transfer by another bank of its rights in the insurance policies was without legal force and vested no right or interest to the policy, and cast upon the bank the burden of showing that undue advantage was not taken of the widow in obtaining an assignment from her.—*Marsh v. Elba Bank & Trust Co.*, Ala., 88 So. 423.

8. **Return of Consideration.**—Where defendant trust company undertook to establish by mail a credit for plaintiff, a resident of Germany, within a reasonable time, to the extent of the equivalent in German exchange of \$750, but defendant trust company, by reason of war conditions, failed to perform, plaintiff is entitled to have a return of the consideration, with interest; her recovery not being limited to the present value in United States currency of the marks purchased.—*Pfotenbauer v. Equitable Trust Co.*, N. Y., 188 N. Y. S. 464.

9. **Bills and Notes—Assignment.**—The fact that the assignee of certain notes and mortgages took the same with notice of his assignor's contract to build an apartment house on the mortgaged lots, in consideration of the notes and mortgages, did not charge him with the assignor's willful neglect to complete the building according to agreed plans and specifications.—*Stephens v. Doxey*, Utah, 198 Pac. 261.

10. **Attorney's Fee.**—A holder of a note, providing for an attorney's fee if collected by legal process, is not entitled to the fee or so much of the note as was collected by him from the estate of a deceased maker, where it does not appear that such collection was obtained through legal proceedings in which services of an attorney were required.—*In re Harris*, U. S. D. C., 272 Fed. 351.

11. **Holder in Due Course.**—Where the maker of a note delivered it to the payee under an agreement that the payee would increase its capital stock and sell agricultural implements to the maker at a reduction, but the stock was not increased, and the maker received nothing for the note, which was indorsed to a third party in payment of an indebtedness of the payee, the indorsee having no knowledge of the circumstances, held, that the indorsee was a holder in due course under Rev. St. 1919, §§ 838 and 843, and had executed the note for value under sections 812 and 814.—*Swift & Co. v. McFarland*, Mo., 231 S. W. 65.

12. **Holder for Value.**—The discount of a trade acceptance and deposit of the amount thereof to the credit of the drawer does not make a bank holder for value, and protect it from defenses existing between the drawer and acceptor, where, in event of failure to pay the acceptance, the amount will be charged back against the drawer's account.—*Sobel v. Engels*, N. Y., 188 N. Y. S. 436.

13. **Brokers—Recovery of Purchase Price.**—Owner, who exchanged land in part payment for other land after inspection of the other land, and who was apparently satisfied with the transaction until his discovery that his brokers who effected exchange had been permitted by other party to transaction to retain a portion of the purchase price in addition to the commission paid him by such owner, could not recover the portion of the purchase price so received by the brokers on ground that they misrepresented the value of the land, where there is no proof of the value of either property or the price of the land received in exchange, and it appears that all negotiations had to do with the trade price between him and the brokers.—*Terry v. Stephens*, Mont., 198 Pac. 360.

14. **Burglary—Chicken House a "House."**—Under Pen. Code, § 469, defining burglary, a chicken house, used for housing chickens, is a "house" within the statute; and it was imma-

terial that it may have been attached to skids so that it could be moved.—*People v. Coffee*, Cal., 198 Pac. 213.

15. **Carriers of Goods—Owner's Risk.**—The uniform bill of lading approved by the Interstate Commerce Commission, providing that property destined to, or taken from, a station at which there is no regularly appointed agent shall be at the owner's risk after unloading or until loaded, and when received or delivered on private or other sidings, shall be at owner's risk until the cars are attached to and after they are detached from trains, does not apply to loaded cars on a public or semi-public siding, or one privately used, but owned by the railroad, at a station at which there is an agent, and they are not at the risk of the shipper where a bill of lading has been issued.—*Yazoo & M. V. R. Co. v. Nichols & Co.*, U. S. S. C., 41 Sup. Ct. 549.

16. **Proof of Weight.**—Proof of weights of grain before and after shipment, when shown to have been carefully made and with proper apparatus, is presumptively correct, but, where the railroad company introduces evidence of mistakes, or other evidence tending to impeach the accuracy or reliability of the weights, or of the record of the weights made, the question of the correctness of the weights is for the jury and is a fact which the shipper must prove by a preponderance of the evidence.—*Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co.*, Neb., 182 N. W. 967.

17. **Carriers of Passengers—Loss of Baggage.**—Where a carrier accepts as baggage the sample trunk of a traveling salesman with knowledge of its character, loss of time and inability to make sales because of delay in receiving trunks containing samples, and necessary and reasonable traveling expenses incurred in looking for the trunks or procuring other samples, will be regarded as within the contemplation of the carrier when it receives and checks traveling salesman's sample trunks as baggage, so as to entitle such salesman to recover damages therefor, in case of such delay.—*St. Louis-San Francisco Ry. Co. v. Freeman*, Okla., 198 Pac. 298.

18. **Commerce—Interstate.**—Where grain was shipped from Missouri to a point in Texas, and the Texas purchaser, on paying the draft with bill of lading attached, sold the grain to a purchaser in another part of Texas, and defendant railroad company before arrival of the shipment issued a bill of lading for transportation to the new destination, that shipment was interstate.—*Missouri, K. & T. Ry. Co. of Texas v. Plano Milling Co.*, Tex., 231 S. W. 100.

19. **Constitutional Law—Authority Over Cable Landings.**—The President is without constitutional power, in the absence of authority from the legislative department, to prohibit the landing of a submarine cable from a foreign country on the coast of the United States or otherwise making connection with its internal telegraph system, and, conceding that Congress by long acquiescence has impliedly given authority to the Executive to prevent the landing of a cable by a foreign corporation, such authority does not extend to the case of a domestic company having a federal franchise under Post Roads Act July 24, 1866, and which has for many years operated internal telegraph lines and the cables between Florida and Cuba constructed by express provisions of Act May 5, 1866, and over which Congress has at various times exercised its authority, directly and through the Interstate Commerce Commission, in regulating its rates over both its internal lines and its cable connections.—*United States v. Western Union Telegraph Co.*, U. S. D. C., 272 Fed. 311.

20. **Distribution of Income Tax.**—St. Mass. 1919, c. 314, providing for the distribution of the income tax collected by the state among the local subdivisions thereof in increasing percentages, and after a few years entirely, in proportion to the amount of the state tax imposed upon each, regardless of the amount of the income tax collected from each, does not deny a taxpayer due process of law or equal protection of law, guaranteed by Const. Amend. 14, though he resided in a town which will receive a smaller proportion of the income tax collected therein than will other towns.—*Dane v. Jackson*, U. S. S. C., 41 Sup. Ct. 566.

21. **Road Improvement.**—An assessment by a road improvement district against a railroad made without any designated basis while other land in the district was assessed on the basis of area and position is so palpable and arbitrary a discrimination as to deny the railroads the equal protection of the laws, especially where the assessment against less than 10 miles of railroad for the construction of 11 miles of highway amounted to a sum greater than any probable, or even possible, benefits could amount to.—*Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 6*, U. S. S. C., 41 Sup. Ct. 604.

22. **Contracts—Compliance With.**—Where, at the time power company agreed to install an electric sign in front of a moving picture theatre, there was a pole and power line or cable on the sidewalk in front of the theatre, the theatre had no legal right to terminate the written contract because the power company refused to make a requested change in the location of the pole and power line or cable in order to place the sign in a certain position, unless previously agreed upon.—*Paldanius v. Strauss*, Ore., 198 Pac. 253.

23. **Corporations—"Laches."**—In an action to rescind a contract for the sale of stock in a corporation, where it appears that plaintiff continued her efforts to surrender the stock and recover the money paid therefor for a period of three years, though not in form amounting to a legal demand, held, that the testimony does not support a finding that plaintiff was guilty of laches.—*Ricker v. J. L. Owens Co.*, Minn., 182 N. W. 960.

24. **District of Columbia—Vault Under Sidewalks.**—Where, in 1884, an application was made by an abutting owner for a permit to erect a building with adjacent vaults under the sidewalk, and the vault was constructed and used ever since, but no formal permit appears in the record, a license to construct and use the vaults, revocable at will, is all that can be inferred against the public.—*District of Columbia v. R. P. Andrews Paper Co.*, U. S. S. C., 41 Sup. Ct. 545.

25. **Divorce—Final Judgment.**—A final judgment in an action for divorce cannot be vacated on the ground that the defendant failed to answer through mistake or excusable neglect.—*Johnson v. Union Inv. Co.*, Minn., 182 N. W. 955.

26. **Drunkenness.**—In a husband's suit for divorce for habitual drunkenness, the fact that plaintiff husband brought home beer for family use would not justify the giving of instructions that he caused or consented to the habitual drunkenness of his wife through the use of whiskey.—*Dorian v. Dorian*, Ill., 131 N. E. 129.

27. **Eminent Domain—Value of Lands.**—Owner of land condemned is entitled to the value of the land for the most profitable use it was available at the time the petition was filed, but this availability does not refer to a future possibility, but to a present capacity for a use which may be anticipated with reasonable certainty and made the basis of an intelligent estimate of value, and its availability for future uses must be such as enter into and affect its market value, and regard must be had to the existing business or wants of the community or such as may be reasonably expected in the immediate future.—*Forest Preserve Dist. v. Kean*, Ill., 131 N. E. 117.

28. **Equity.**—Laches. — Laches shown on the face of the bill can be taken advantage of by demurrer.—*O'Brien v. O'Brien*, Mass., 131 N. E. 177.

29. **Executors and Administrators—Conveyance of Land.**—Where one who has agreed to sell land died before executing a conveyance, and the purchaser makes an agreement with the administrator whereby the latter bound himself to obtain a good and valid conveyance, but was not acting on behalf of the other heirs, who knew nothing about the agreement, such agreement was not binding on decedent's estate.—*De Profit v. Heydecker*, Ill., 131 N. E. 114.

30. **Insufficient Bond.**—When an administrator is given license in the district court to sell land for the payment of debts and the court orders him to give a bond to account for the proceeds of the sale, after the sale is confirmed, from which no appeal is taken, and the property is in the hands of a good-faith purchaser, an objection that the sale bond was insufficient, because the penalty of the bond ap-

pears to have been left blank, will not invalidate the sale, where the bond may be reformed in equity and a remedy had thereon.—*Pohienz v. Panko*, Neb., 182 N. W. 972.

31. **Explosives.—Reasonable Care.**—While a town superintendent of streets had a right to work a quarry leased by the town to obtain material for making or mending the public ways, he was bound to prevent fragments of rock from falling or being thrown on plaintiffs' land, and to take every reasonable precaution that the blasts should not be so violent and successive as to shake or materially injure plaintiffs' house.—*Stevens v. Town of Dedham*, Mass., 131 N. E. 171.

32. **Frauds, Statute of.—Breach of Contract.**—In an action of general assumpsit with a special complaint for damages for breach of contract for sale of certain standing timber and pulpwood, plaintiff offering in evidence a writing signed by himself, but not by defendants, whereby he sold them certain timber for pulpwood and giving them six months to remove it, such writing was admissible, though such contracts are for sale of an interest in land and required by the statute to be in writing and signed by the parties to be charged; the particular writing having become binding as fast as it became executed by defendant's severing the trees.—*Ross v. Hamilton*, Vt., 113 Atl. 781.

33.—**Brokers' Bought and Sold Slips Admissible.**—Where brokers' bought and sold slips, evidencing sales of cotton for future delivery, gave the address of the party to be charged, and there was testimony that, when each bought slip was signed, a corresponding sold slip was signed by the party to be charged thereby, and that when each sold slip was signed a corresponding bought slip was signed, the slips were admissible, under Cotton Futures Act, §§ 4, 5 (Comp. St. §§ 6309d., 6309e), requiring contracts to be in writing and to give the names and addresses of the seller and buyer.—*Gettys v. Newburger*, U. S. C. C. A., 272 Fed. 209.

34. **Insurance.—Cancellation.**—Where, because of the promise of local agents of a fire insurance company to cancel insured's policy covering certain household goods, insured procured other insurance, and the local agents failed to make the promised cancellation, but, after a fire destroying the goods, informed the insured that he had "some loss" under the policy, the company was estopped to assert as a defense that the insured had procured other insurance, the company issuing the other policy having paid only one-half the amount thereof, on the ground of the existence of the insurance sued for.—*Clark v. Fidelity-Phenix Fire Ins. Co. of New York*, Mo., 231 S. W. 74.

35.—**"Combat."**—Stipulation that there should be no liability if insured died as result of "combat" precluded recovery on insured's death while engaged in combat only if the insured brought on the difficulty and encounter in which he met his death.—*Eminent Household of Columbian Woodmen v. Payne*, Ala., 88 So. 454.

36.—**Conditions in Policy.**—A condition in an insurance policy that, if insured's death occurred within six calendar months from its date, the beneficiary would receive only one-half of the amount mentioned therein, and the full amount if death occurred thereafter, contravened Rev. St. 1911, art. 4742, subd. 3, providing that no life insurance policy shall contain any provision for settlement for less than the amounts insured on the face of the policy, plus dividend and less indebtedness and premiums.—*American Nat. Ins. Co. v. Dixon*, Tex., 231 S. W. 165.

37.—**Proximate Cause of Injury.**—If diabetes was an effect of insured's accidental injury, a mere link in the chain between the accident and its effect, the condition of insured would be attributable to the accidental injury, and not the disease.—*Anderson v. Mutual Benefit Health & Accident Ass'n*, Mo., 231 S. W. 75.

38. **Intoxicating Liquors.—Accomplice.**—Where the prosecuting witness and another, discovering that defendant was not at home, found him in another place, and defendant, in response to an inquiry as to where the prosecuting witness could procure whisky, stated that he had a cotton picker who could furnish liquor, etc., but defendant was not present at the sale, he is not guilty as a principal, for he was not present, he did not keep watch, he did not assist in the unlawful act, he did not

endeavor to secure the safety or concealment of the sellers, he did not employ an innocent agent, and he did not advise or agree to the commission of the offense.—*Chandler v. State*, Tex., 231 S. W. 105.

39.—**Admissibility of Evidence.**—Where one is charged with having in his possession intoxicating liquor with the intent of violating the prohibitory law, the general reputation of his place of business as being a place where intoxicating liquors were sold may be shown upon the laying of a proper predicate for the introduction of such testimony.—*Friedman v. State*, Okla., 198 Pac. 350.

40.—**Excess Tax.**—A holder of a liquor tax certificate, issued pursuant to the provisions of Liquor Tax Law, § 8, subd. 2, who filed a return under section 9-a, subd. 4, of such law, added by Laws 1917, c. 623, and erroneously included therein tax receipts which were exempt from the imposition of said tax, and paid the tax as computed and assessed on the erroneous return voluntarily under a mistake of law, without coercion or duress, cannot recover the excess.—*Brotherhood Wine Co. v. State*, N. Y., 188 N. Y. S. 490.

41.—**Illegal Use of Automobile.**—In state's action to condemn automobile used in transportation of prohibited liquor by person other than owner, owner interposing claim thereto, was required to allege that he could not, by reasonable diligence, have obtained knowledge or notice of the illegal use of the car.—*Glover v. State*, Ala., 88 So. 437.

42.—**Volstead Act.—National Prohibition Act.** which was intended to prevent the distilling of spirits for beverage purposes, and which impose on any person violating the act a penalty of fine and imprisonment, and also double the tax theretofore imposed by existing laws with an additional specific penalty, manifests an intention to prescribe the full penalty for unlawful distilling, and repealed Rev. St. § 3257, making it an offense to defraud the United States of a tax on spirits by one carrying on a business of a distillery, in so far as it relates to distilling for beverage purposes, notwithstanding the provision of section 35 of the Prohibition Act that the act does not relieve any person from liability, civil or criminal, incurred under existing laws.—*United States v. Yuginovich*, U. S. S. C., 41 Sup. Ct. 551.

43. **Landlord and Tenant.—Insufficient Rent.**—A rent of \$35 a month held not a reasonable rent from the owner's viewpoint considering taxes, repairs, insurance, and allowance of 5 per cent. interest on the purchase price.—*Stein v. Eckert*, N. Y., 188 N. Y. S. 469.

44.—**Termination of Lease.**—Where United States Housing Corporation Incorporated, leased premises under a contract wherein lessee agreed to move at any time on 30 days' notice, it was no defense to proceedings by the corporation to have the lessee removed that the lessor's purpose in terminating the lease was to obtain a greater rental, notwithstanding Act Cong. July 19, 1919, and Laws N. Y. 1920, cc. 136, 139.—*Application United States Housing Corporation*, N. Y., 188 N. Y. S. 365.

45.—**Unreasonable Rent.**—In action for rent under lease made after Laws 1920, c. 136, became effective, in which it appeared that the rentals were substantially increased over the rentals as they existed one year prior to the dates of the leases, the tenant was entitled to the presumption that the lease was unjust, unreasonable, and oppressive, though it was executed prior to the time when chapter 944, § 3, amending such statute, became effective, since the statute in its unamended form gave the tenant the benefit of such presumption.—*Lewine v. Well*, N. Y., 188 N. Y. S. 385.

46. **Master and Servant.—Sunstroke.**—In a proceeding under the Workmen's Compensation Act for the death of an employee, who suffered a sunstroke while delivering a load of coal, where there was no evidence that, while engaged in delivering coal, he was peculiarly exposed to the danger of sunstroke by reason of the nature of the work, a finding that the claimant had not satisfied the burden of proving that the employee by reason of his employment was subjected to materially greater danger of sunstroke than other outdoor workers was not unsupported by evidence as a matter of law.—*Dougherty's Case*, Mass., 131 N. E. 167.

47. **Municipal Corporations.—Damages by Mob.**—Rev. Laws, c. 211, § 8, making cities and

towns liable for three-fourths of the value of property destroyed or injured by persons riotously or tumultuously assembled naturally imports the physical existence of a tangible thing, which may be the subject of property, and does not apply to a theft of the property which is only an injury to the owner's possessory right, and not an injury to the property.—*Yalenezian v. City of Boston, Mass.*, 131 N. E. 220.

48.—**Discretion of Officers.**—A court of equity cannot properly interfere with, or in advance restrain, the discretion of a board of city commissioners, while such board, in the exercise of powers conferred by the charter or general laws, is considering a proposition as to whether certain streets and alleys in the city are to be paved.—*Hufford v. Flynn, N. D.*, 182 N. W.

49.—**Discretionary Powers.**—When sweeping the streets, a municipality is exercising its discretionary powers to protect the public health and comfort, and not performing a special corporate or municipal duty to keep them in repair, and therefore it is not liable for the negligent acts of its employees engaged in sweeping the streets.—*Harris v. District of Columbia, U. S. S. C.*, 41 Sup. Ct. 610.

50.—**Sidewalks.**—It is the duty of a municipality to keep and maintain the entire width of its sidewalks in a reasonably safe condition for public travel and a failure on the part of the municipality to use ordinary care in that respect after notice of a sidewalk's unsafe condition or when by the exercise of ordinary care it could have had knowledge of the defective condition of the walk will render the municipality liable if sufficient time has elapsed after notice, etc., for the municipality to have remedied the condition.—*City of Newport v. Schmit, Ky.*, 231 S. W. 54.

51.—**Oils and Gas.**—Impairment of Obligation.—If an oil and gas company was not a public utility at the time of contracting with smelting companies to furnish them gas giving such smelting companies prior call on supply, and the contracts were not entered into in anticipation of the gas company becoming such a public utility, but were merely private undertakings concerning a subject-matter over which the state had no control, the contracts were valid, and the obligations thereof could not be impaired by any state regulation.—*Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co. Ark.*, 230 S. W. 897.

52.—**Parent and Child.**—Support.—The father of a minor, whom he has emancipated, is not thereby relieved from the obligation to support an indigent child.—*Hendrickson v. Town of Queen, N. D.*, 182 N. W. 953.

53.—**Physicians and Surgeons.**—Error of judgment.—If a regularly licensed physician with reasonable diligence employs the skill of which he is possessed in treating a surgical case, he is not liable for an error of judgment, and the fact that the patient dies is not evidence of neglect.—*Emerson v. Lumbermen's Hospital Ass'n, Ore.*, 198 Pac. 231.

54.—**Post Office.**—Contract for Carrying Mails.—A contract between a railroad company and the Post Office Department for the carrying of the mails, which was made after express notice by the department that the railroad would be subject to all the postal laws and regulations, which were then or might become applicable during the term of the service, is subject to a readjustment of the compensation under a statute enacted after the contract was made, especially where the readjustment was made because of the discontinuance by the railroad of an important item of the services on which the compensation was computed.—*Missouri, K. & T. Ry. Co. v. United States, U. S. S. C.*, 41 Sup. Ct. 617.

55.—**Railroads.**—Use by Public.—Where the public generally, with the knowledge and acquiescence of a railroad company, have continually used its tracks as a footpath for a long period of time, the presence of persons on the tracks must be anticipated, and it is the company's duty to give warning of the approach of trains and to operate them at a reasonable rate of speed, maintaining proper lookout, and, unless signals are given, an engineer has no right to assume that a person with his back to the train knows of its approach.—*Hines v. Wilson's Adm'x, Ky.*, 231 S. W. 23.

56.—**Replevin.**—Value of Property.—At common law an action in replevin tests only the right of possession of the replevined property at the time of the commencement of the action and the value of the property is immaterial, so that it is not necessary, in the absence of a statutory requirement, that the value of the property be found separate from the damages awarded defendant for the taking of the same under the writ.—*Quinlan v. Jones, Wyo.*, 198 Pac. 352.

57.—**Sales.**—Contract.—Defendant's letter to plaintiff offering to sell the waste products of its mill for the following year at prices therein stated and plaintiff's answer that the arrangements in defendant's letter were satisfactory constituted a contract between the parties.—*Reliable Waste Co. v. Waterhead Mills, Mass.*, 131 N. E. 215.

58.—**Statutes.**—Excise Tax.—The provisions of Laws, N. M. 1919, c. 93, requiring an annual license tax from distributors of gasoline and prohibiting any sales of gasoline until the tax had been paid, are not separable as to domestic and interstate distributors, and therefore the assessment and collection of license tax will be restrained as to all dealers, notwithstanding the statement by the state officers that they did not intend to collect from dealers whose transactions were entirely interstate.—*Bowman v. Continental Oil Co., U. S. S. C.*, 41 Sup. Ct. 606.

59.—**Sunday.**—Notice of Injury.—Notice to the mayor of a city of the first class of an accident on a defective sidewalk is not in any sense a legal process, under Rev. St. 1919, § 1211, declaring that the service of every such writ on Sunday shall be void; hence, where such notice was received on Sunday, but the 60-day period within which notice was required to be given by Rev. St. 1919, § 7955, did not expire with Sunday, but there yet remained several secular days, the notice is in time and should be considered, for the mayor had it on the following Monday.—*Thomas v. City of St. Joseph, Mo.*, 231 S. W. 63.

60.—**Taxation.**—Exemptions.—Tax Law, §§ 351, 352, 357, 359, imposing a tax based on a person's net income, held not unconstitutional in so far as it provided for the taxation of interest on real estate mortgages, as against the contention that the taxation of such income impaired the obligation of the state's contract with mortgagees created by section 251, exempting "mortgages" on which recordation tax is paid from other taxation "by the state, counties, cities, towns, villages, school districts and other local subdivisions of the state," since it is only the principal debt, and not the interest, that is exempted from taxation by section 251, in view of section 253, and in view of the purpose of such exemption, and since the income tax is not directly imposed on particular income, but is a tax on the individual, to be determined according to his net income, in view of sections 351, 357, 359, 360, 362.—*People v. Wendell, N. Y.*, 188 N. Y. S. 344.

61.—**Telegraphs and Telephones.**—Delay.—In an action against a telegraph company to recover the penalty provided for delay in delivering a telegram, where it appeared that at the time telegraph companies were under federal control, held, that a demurrer to plaintiff's evidence should have been sustained.—*Taylor v. Western Union Telegraph Co., Mo.*, 231 S. W. 78.

62.—**Trusts.**—Speculation.—A trustee is not permitted to buy and sell bonds on speculation and the fluctuations in market value after purchase by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting between life tenant and remaindermen for funds from the trust estate invested in income-bearing property.—*In Re Gartenlaub's Estate, Cal.*, 198 Pac. 209.

63.—**United States.**—Unauthorized Improvement.—Act June 25, 1910, Act Feb. 27, 1911, and Act July 25, 1912, making appropriations for improving a harbor channel and for completing the improvement, did not authorize the Secretary of War to contract for the completion of the improvement at a cost exceeding the amount appropriated, especially in view of Rev. St. §§ 3732, 3733, 5503, denying authority to make contracts on behalf of the United States in excess of appropriations therefor.—*Sutton v. United States, U. S. S. C.*, 41 Sup. Ct. 563.

Central Law Journal.

St. Louis, Mo., September 16, 1921.

IS MORTGAGOR RELIEVED OF DEBT WHERE MORTGAGEE RELEASED GRAN- TEE WHO ASSUMED THE DEBT?

The question of the position of a mortgagor, whose grantee, on purchase of the property, assumes the debt, is one on which the courts have divided. Whether the mortgagor, in case of the assumption of the mortgage, shall thereafter be regarded only as a surety, or whether he remains obligated to pay the debt as a principal, is the point on which the authorities are not agreed.

In the recent case of *In re Roth*, 272 Fed. 516, the District Court (N. D. E. D., Ohio) held that the mortgagor who had conveyed the property to a grantee, who assumed the debt and agreed to pay it, is thereafter, under the weight of authority and in principle, only a surety for the payment of the debt, and the release of the obligation of the grantee by the mortgagee, with knowledge of the assumption of the debt, releases the mortgagor.

In this case, A gave a third mortgage to B, and later sold the property to C. The latter, discovering the fact that the property would not be sufficient to pay all three mortgages, induced B to release the third mortgage so that he could make an advantageous disposition of the property. Later A becomes a bankrupt and B seeks to prove up the note representing his loan to A, as a claim against A's estate. The referee, following the Ohio law under which the mortgagor, in the case of assumption of a mortgage debt, nevertheless remains bound as a principal, allowed the claim. The District Court reversed the order of the referee and held that the question was not one of local law, but was one of general jurisprudence and that the weight of authority regarded the mortgagor in such cases as a surety, and

therefore discharged from his obligation if the mortgagee releases a grantee who has assumed the debt.

The earlier federal decisions on this point are not clear. In *Kellar v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, the Supreme Court seems to be in accord with the rule in *Denison University v. Manning*, 65 Oh. St. 138, 61 N. E. 706, on which the referee relied. But in *Johns v. Wilson*, 180 U. S. 410, Justice Brown, after reviewing *Keller v. Ashford* and other cases, said:

"That under the equitable doctrine that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt, the mortgagee was entitled to avail himself of an agreement in a deed of conveyance from the mortgagor, by which the grantee promised to pay the mortgage. This is upon the theory that the purchaser of land subject to the mortgage becomes the principal debtor, and the liability of the vendor, as between the parties, is that of surety."

The Court in the principal case clearly states the reasons which support the rule adhered to by the majority of the courts of this country. The Court said:

"The mortgagee, it is true, is not a party to the agreement of assumption entered into between the mortgagor and his grantee, and the latter cannot, by any act alone of theirs, make him a party thereto, or impair any of his original rights. He may stand upon his rights, and enforce his debt against the original mortgagor; he may stand ready to receive payment from any one, including the grantee, and may, from time to time, accept payment from him; and, if he does nothing more, his mere laches or failure to collect will not impair his remedies against his original debtor, the mortgagor. He may also, either at law or in equity, according to the practice of the forum, sue the grantee on his assumption of the debt. So far all of the authorities are agreed. On the other hand, if, after learning of the change of relationship effected by the agreement between the mortgagor and mortgagee, he sees fit to enter into contractual relations with the grantee, then he, in a sense, makes himself a party thereto, and must in so contracting and henceforward deal with the parties in view of that changed

relationship. This imposes upon him no hardship, and does not, against his will, alter his original contract. If he, by this contract with the grantee or thereafter, releases the grantee, or by valid agreement extends the grantee's time of payment, or otherwise alters the terms of the original obligation, no good reason is perceived why the rule applicable as between principal and surety should not be applied to him. The mortgagor, like any other surety called upon to make payment, is entitled to have surrendered unimpaired all securities and remedies which the creditor holds, including in this case both the mortgage and the personal obligation of the Lumber Company to pay the mortgagor's debt to the Supply Company. His rights as against his principal debtor are impaired by the voluntary and intentional act of the mortgagee."

The following are some of the authorities in which this rule is applied: *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Marriam v. Miles*, 54 Neb. 566, 74 N. W. 861, 69 Am. St. Rep. 731; *Fanning v. Murphy*, 126 Wis. 545, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946, 5 Ann. Cas. 435; *Pratt v. Conway*, 148 Mo. 296, 49 S. W. 1028, 71 Am. St. Rep. 602; *Calve v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Home National Bank v. Waterman*, 131 Ill. 461, 467, 29 N. E. 503.

NOTES OF IMPORTANT DECISIONS

WHEN EQUITY WILL RELIEVE AGAINST A FORFEITURE OF AN OPTIONAL OIL LEASE FOR FAILING TO PAY RENTAL ON TIME.—Speculative leases providing for exploration of oil and gas usually stipulate that "unless oil or gas is found the lease shall continue for five or ten years on payment to a designated depository of an annual sum of money called 'rent'." These leases are called "options" in Oklahoma, and in some places "unless" leases.

In most cases these leases are obtained for speculative purposes, and the rental frequently is not paid after the first or second year. These are usually known as wild-cat leases, since they are located in unproven territory. Other leases of a similar character in proven territory have a regular market value and pass from hand to

hand like negotiable securities. The danger involved to the rights conferred by these leases is in failure to pay the rental on the agreed date each year. Much litigation has arisen by attempts of the lessors in proven territory to take advantage of the non-payment of the rent to declare a forfeiture of the lease and bring suit to cancel it and clear the lessor's title. Such suits usually succeed where the lessee has been negligent in making his payments, but where the lessee or his assignee can show that he was diligent, but that the rental was not paid on the date specified because of "unavoidable casualty," equity will relieve against a forfeiture of the lease. *Harvey v. Benmo Oil Co.*, 272 Fed. Rep. 475.

In the *Harvey* case the defendant, in a suit to cancel a lease, set up the fact that he put a check in payment of the annual rental in registered envelope and deposited the letter in the mail in time to reach the plaintiff's depository one day before the rental was due, but that owing to some unavoidable casualty the letter did not reach its destination until two days after the day the rent was due. In holding that the defendant was entitled in equity to relief from the forfeiture, the District Court (E. D., Okla.) said:

"In the development of the oil business large sums of money are paid for such leases as have been held to be options. Courts of equity should reasonably take into consideration the nature of the business, and where equity justifies it, relief should be awarded to avert injustice. No negligence is here disclosed, but, on the contrary, diligence is manifested. On account of an unavoidable casualty the defendants' delay money or rental was not placed to plaintiff's credit in the depository until June 18th, when it should have been there on June 16. Defendant would sustain a loss as to property rights *in personam* in the nature of a forfeiture, unless the powers of equity intervene to prevent such injustice."

One of the leading cases on this subject is that of *Brunson v. Carter Oil Co.*, 259 Fed. Rep. 656, where the Court said:

"A lessee in an 'unless' oil and gas lease, which paid a substantial consideration for an optional right of exploration, with right of renewal each year thereafter for five years, by paying a yearly rental in advance, and which paid the rental for the first renewal, and also for the second in due time, but through inadvertence and mistake made the second payment to the original lessor, as shown by its system of records upon which it relied for such purpose, although notified of the transfer of the land, when sued for cancellation of the lease, held entitled to equitable relief under Rev. Laws Okla. 1910, § 2844, providing for relief against forfeiture or a loss in the nature of a forfeiture, occurring without gross negligence or fraud."

The Supreme Court of Oklahoma has limited the doctrine in the Brunson case to cases of mistake and will not relieve against a forfeiture where there is negligence or avoidable delay on the part of the lessor. In the case of *Eastern Oil Co. v. Smith*, (Okla.) 195 Pac. 773, the Court said:

"Defendant further relied upon the case of *Brunson v. Carter Oil Co.*, D. C., 259 Fed. 656, * * *. In that case (the Court) based his contention upon § 2844 and § 908, R. L. 1910, yet in that case the issue was raised by the pleadings, and mistake was pleaded. This Court distinguished the facts in that case, in the case of *Garfield Oil Co. v. Champlin*, 78 Okla. 91, 189 Pac. 514, Justice Pitchford, who delivered the opinion of the Court, held that under the facts in that case there was a difference between a mistake and negligence, and that the Court never gave any relief on the grounds of negligence. * * * The facts in this case do not bring it within the rule announced in the case of *Brunson v. Carter Oil Co.*, *supra*. The company failed to give any excuse for not making said payment, although it had notice both at the Tulsa and Buffalo office, at least two weeks prior to the time the payment was due, that there was a controversy over its check, and it gives no reason or explanation of why it did not attend to the matter until March 27, 1919. Even if this Court would follow * * * *Brunson v. Carter Oil Co.*, the facts here do not bring it within the rule announced in that case."

BUSINESS METHODS IN A LAWYER'S OFFICE.*

Countless ages ago a prehistoric ancestor discovered that a club, heavier at one end than at the other, made a better weapon of offense and defense than his own bare hands. His companions, and in time his enemies, observed his greater efficiency, profited by the discovery, and not only improved on the original idea, but discovered new methods whereby their efficiency as hunters and warriors was enhanced. To such an humble origin must the modern efficiency expert trace the beginning of his calling. The progress through the ages has been slow, and the phenomenal inventions of the past century have been along the lines of new and improved mechanical devices rather than the discovery of better and more efficient methods of handling the work in hand. Only recently has the study

of methods become a distinct calling and acquired a name suggesting its purpose. Now, intelligent and progressive manufacturers and merchants everywhere are not only analyzing the methods by which they produce their products, distribute their merchandise and handle office routine, but the study has become a science, and men specialize as efficiency experts. For example, the Metropolitan Life Insurance Company discovered, after painstaking analysis, that by efficient methods a policy could be carried through its various departments in two or three hours instead of as many days, and one of the large Eastern banks, by similar studies, made corresponding reductions in the time and labor necessary to handle checks coming through the mails.

The saving in time and human endeavor through such studies has not been accomplished alone through the installation of labor-saving machinery, but to a very large extent has been effected by the elimination of useless motions and unnecessary exertion. In many factories, moving pictures have been taken of employees performing routine tasks—both of the slow and the fast producers—and these pictures have been reproduced at a slower speed. On the average, the quick workman was found to be producing the larger output at about the same expenditure of energy as his slower companion, the gain in production being attributable to a large extent to his elimination of useless motions. As a result of observation and analysis of these pictures, the inefficient workmen were trained until they, too, could perform their tasks at a minimum of exertion with a maximum of production. Closely associated with this investigation of economical methods in factory and office operation has been a corresponding scrutiny of accounting methods, and a challenge of former estimates of the cost of doing business, and of producing or marketing a given article. Some of the results obtained have been startling to the parties intimately

concerned. The field of investigation has proved to be so wide that much remains to be solved in cost accounting, although its general principles are well established.

These methods of the business world are not only profoundly interesting to a lawyer, but are of practical use in every law office, from the largest organization down to the humble office of the young lawyer just entering the profession. They are likewise available, because of a new spirit of co-operation that has gradually been permeating the business world, well illustrated by a story vouched for as an actual occurrence. A candy manufacturer, as a result of a careful study of his own sales organization, found that as a general rule his customers, partly through their own fault and partly through the misdirected zeal of his salesmen, were purchasing candy in large quantities and at infrequent intervals. As a necessary result of this practice the ultimate consumer received much of his candy stale, and became disgusted with the brand. The obvious remedy of suggesting to the retailer the advantage of smaller purchases at more frequent intervals was applied, and the consumers of this particular brand of candy soon became aware of its universal freshness. Up to this point there is nothing unusual in the story, but had the manufacturer, and countless other independent investigators, kept such discoveries to themselves, much of the progress that has recently been made in business methods would have been impossible, and the material for this paper would have been unavailable. This candy manufacturer was shrewd enough to see that many customers, continually purchased stale candy, even though under the brand of competitors, would in time turn in disgust to fruit or other lines, and their trade be lost to his own fresh candy. To the amazement of his principal competitor, he invited the latter to lunch, and disclaiming any altruistic motive, made a full disclosure of his discoveries, and placed them at the disposal of his competitor

for their common profit. As a result of such disclosures an immense fund of information has accumulated and is available through various books and magazines. Many hours can be devoted to the explanation of various plans of handling office routine and to the relative advantages of each, but such methods as are mentioned will be incidental and subservient to the main purpose—that of arousing lawyers to a greater interest in efficient methods.

In a general way, office equipment and systems should serve three distinct purposes. First, the performance of the task in hand in the quickest time, and with the least effort upon the part of the lawyer and his clerk. Second, the keeping of adequate records of all the work performed so that no loss may result by reason of failure to bill for services rendered. And last, the keeping of the book-keeping records by a system that will give the lawyer an adequate idea of his overhead expenses, so that his charges may be so adjusted as to provide an adequate return for his labor and skill after deducting all apparent costs, and some that ordinarily are not considered as expenses of doing business. The performance of a given task in the quickest time and with the least effort upon the part of the lawyer and his clerk is probably the strongest incentive for the installation of modern labor-saving appliances. The most common and useful of these appliances is, of course, the typewriter. Much less common is the dictating machine, which is especially valuable to the lawyer. The present cost of four hundred dollars for a complete outfit has tended to restrict its use, but even at that price it is a paying investment to any lawyer who is at all busy. Its advantages lie in the fact that matter may be dictated at any hour of the day or night, irrespective of whether a stenographer is present or busy, that there is no limit to speed at which the matter may be dictated, and that there is no interruption of transcribing during the periods of dictation. Typists soon get

accustomed to the new system, turn out more work, and make fewer mistakes. The writer has used the system for six months, and regards the cost as one of the best investments he has made.

Good equipment alone is not sufficient without a well planned system. All routine work and all possible minor tasks should be delegated to the stenographer. The lawyer's time is too valuable to be taken up with such matters. The use of standardized forms in this connection is of great value, especially if the lawyer has a specialized practice. In such offices the most convenient system is the preparation of standard paragraphs for letters, grouped under various subjects, which paragraphs are numbered and transcribed by the typist without the necessity of dictation or reference other than to the form number.

A great saving in time and improvement in accuracy can be made in drafting deeds, mortgages, standard contracts and the more common forms of court proceedings and orders by the use of standard forms. The writer has, for years, used a system of his own that is especially convenient. In the case of a deed, a standard form is typewritten, and in the blank space for the name of the grantors, county, name of grantees, county, consideration, description, assumption of liens (if any), date of deed, date of acknowledgment and name of persons acknowledging, there is placed a number, beginning with number one and continuing as high as necessary. To make the numbers more conspicuous they are written in red ink. In drafting a deed under such an arrangement it is only necessary to write or dictate the information called for by each numbered blank, and there is no danger through lapse of memory of omitting or crudely wording some necessary provision. In the case of mortgages and many contracts, separate paragraphs can be drafted covering every common situation and, by assigning these paragraphs a number, they may be included or omitted by mere reference to their red ink number. A very

valuable collection of contract and court forms may soon be acquired by making an extra copy of all such documents prepared, running a line of red ink through all names and special features and assigning numbers to these blanks. These forms are filed and indexed according to the subjects, and it is surprising how much time they save, as the drafting anew, or even the mere dictation, of lengthy documents is a tedious process.

Planning of the office work is necessary if it is to be done on schedule and with a minimum of effort. This requires a record of engagements and matters requiring attention in the future. The use of a calendar pad or a diary is satisfactory, but those who have made the matter a study recommend the replacement of these by a small card index file provided with guides for the days of the month and for each month of the year. Slips of paper, on which are jotted down memorandums, automatically come to the attention on the day on which they require action. The advantage of the card index system over calendar pads and dairies is that matters postponed may be reassigned a new date without the necessity of re-writing the item, the slip being merely taken out and placed at the later date. Whether justly so or not, lawyers are frequently accused of lack of system in this particular.

The filing of documents and correspondence is one of the most exasperating tasks that confronts the lawyer. There are many good filing systems, but all sooner or later break down in some particular. If every paper is permanently filed, the office soon becomes congested with transfer cases. For some time the writer has used a system with a reasonable measure of success, whereby correspondence is filed in three distinct sets of vertical files, all alphabetically arranged. All live matters are placed in a vertical file labeled "Pending Correspondence." As soon as a matter is closed, the file is inspected as to the advisability of keeping all, or part of it, in a permanent file. If the matter is of a trivial nature, it is transferred to a vertical file

labeled "Closed—Unimportant." At the beginning of 1920, all 1918 correspondence in this file was destroyed, on the theory that any developments requiring its use would have transpired within the year 1919. All matters of importance are transferred from "Pending Correspondence" to the permanent file of closed matters, and when the file overflows, are removed to transfer cases. In the case of collections, the copy of the letter closing the transaction is placed in the permanent closed file, and the remaining papers are preserved for one year in the "Closed—Unimportant" file. As a complete bookkeeping record is kept of all money transactions, a reasonably sufficient record remains.

All court papers and documents are placed in vertical files, pending matters being alphabetically arranged in a file marked "Pending." When a matter is closed, the papers are destroyed, if unimportant, otherwise they are placed in a numbered folder, and vertically filed in a Permanent File, of which a record is kept in a card index, cross-reference being made to all parties connected with the transaction. There are frequently so many parties interested in litigation that it is impossible to file the document alphabetically unless a memorandum is made of the place assigned to the file and this filed under each name. Assigning the permanent file a number and indexing the parties alphabetically on a card index requires little time, and there is less possibility of the file becoming misplaced.

The average lawyer relegates to secondary importance, if he considers it at all, the keeping of an accurate record of all the work he has done throughout the day. He also gives little consideration to the installation of a system by which he can determine with a reasonable degree of accuracy the value per hour or per day of such services as he renders. Considering the loose methods of accounting that have prevailed until recently in the mercantile world, this condition is not surprising, but the legal

profession is too intelligent and progressive to lag behind the business world. Theoretically, a record should be kept of every minute in the day; practically, only the more important matters can be preserved. In large offices employing a bookkeeper, each member of the firm should be provided with a pad of printed blanks, on which he will note down the day and hour and time consumed on each item to which he devotes his attention, and to whom the services are to be charged. These slips will be assorted, posted and filed by the bookkeeper. Such a system is too cumbersome for the small office. A much better record is made by having blanks printed and padded, about six by nine inches, with a column in which the working hours of the day are divided into fifteen-minute intervals, followed by columns for the nature of the services rendered, to whom charged and the time consumed. A complete record is thus available, and proper charges can be made. In cases where clients question the reasonableness of the fee, such record of the work done is invaluable. At first it is difficult to remember to keep such a record, but in time it becomes as easy as any other part of the office routine. As a means of refreshing the memory such a record often becomes valuable, and from its use many small services will be billed and collected that otherwise would have been forgotten. In the hurry of busy times, a lawyer frequently forgets extra services he has rendered, but with such a memorandum he cannot do so, and the losses thus avoided amount to a considerable sum in the period of a year.

Every lawyer, for his client's advantage in the trial of cases, if not for his own good, should be trained in the fundamental principles of bookkeeping and accounting. Such a course requires but a short study, and the practicing attorney who cannot attend a business college will be amply repaid for the trouble in taking a correspondence school course in accounting. It is just as important for the lawyer to have an accurate record of his income and expenses

as it is for the business man, and by using modern methods the keeping of books need not be a burden. By the use of the multi-column cash book, whereby the totals for the month on the most items and not the individual items are posted, much useless posting is saved, and the labor reduced to a minimum. Through such a system the writer has greatly reduced the use of a journal. In the case of a collection, the total is placed in the total column of the cash book, the fee retained is placed in the special column for that purpose, and the net amount is placed in a column which requires no footing. If remittance is made during the month, thereby closing out the account, he even avoids the necessity of posting by placing red ink cross in the Ledger Folio Column. The account, though not posted, is nevertheless indexed in the ledger by showing the Cash Book page, so that it may be readily found should occasion require. Such a system represents the minimum of effort consistent with a complete record. By carrying special columns in the cash book for office expense, law library and any other subdivisions of expense that may suggest themselves, a complete record of these items can be made with little labor by posting the totals of the columns at the end of the month. In this day of universal income taxes, it is well to see that these classifications are made according to government rules to obviate the necessity of separating items not allowable as credits in the income tax return. A lawyer should keep a record by months of his gross income of prior years. In no other way can he know either his present standing or the progress he is making as a money-maker. In the small office, a weekly cash balance is sufficient, though the daily balance should be taken in larger offices, and in each case the trust funds should be deducted in order to demonstrate that they are unimpaired.

The fixing of fees upon an intelligent and demonstrable basis would relieve the lawyer of many disputes and misunderstandings. While it will never be possible to determine

fees with the exactness prevailing in the sale of commodities, owing to the fact that consideration must be given to the experience and skill of the lawyer, to the amount involved, to the intricacy of the question presented for trial or determination, to the fact that the case was won, lost or compromised, and to innumerable special circumstances, yet the keeping of the records heretofore recommended, and the application to them of the settled principles of cost accounting will go far towards removing from dispute many charges, especially as to small matters. It is the belief of the writer, based upon an analysis of records he has kept for some time, that the average lawyer greatly undercharges for small services rendered through failure not only to give adequate consideration to the monetary expense of doing business, and through failure to consider the delay in larger matters caused by the interruption, but from complete neglect to take into consideration that over-head in a lawyer's office should include also the time devoted to routine work that cannot be assigned directly to any particular client. Any lawyer who keeps a record by ten or fifteen minute periods throughout the day will soon discover that, on the average, a very considerable part of his day has been occupied with work that he can not charge directly to any particular client, but from which all clients derive a benefit. On the average, the lawyer has spent probably fifteen minutes in opening his mail, thirty minutes in dictating miscellaneous letters, fifteen minutes in making his bank deposits and writing checks for office matters, fifteen minutes in reading advance sheets of the reporter system and in keeping up to date with the decisions, an appreciable time in purchasing office supplies and considering and making changes in his office system to provide for the growth of his business, an appreciable time in keeping his books, and an appreciable time in disposing of book agents, and in doing his part in civic and charitable enterprises that require attention during office hours. Where there is only

one lawyer in the firm, this expenditure of time on the average probably amounts to two or three hours per day, and may even exceed this figure. In a large law office, where the increased number in the firm permits a more competent clerical and accounting force, with lessened detail burdens on the members of the firm, the total loss of time will be less, but the gain will offset to some extent by the increased salaries, rent and cost of office equipment and supplies. From the point of compensation the lawyer is selling his time, which has a value in proportion to his experience and skill, but in making this sale he is not in the situation of the mechanic who sells so many hours' service, and who receives a net income with no deduction for heavy office expenses. The lawyer is rather in the position of the merchant who sells an article which cost him a definite sum. Before determining the sale price of this article, the merchant estimates the total expense for the year of rent, light, heat, insurance, taxes, salaries, depreciation and obsolescence on fixtures and equipment, allowable for uncollectable accounts, the usual interest or rate of return on capital invested, and all other costs of doing business. Assuming that these expenses amount to \$20,000.00, and that probable annual sales amount to \$100,000.00, the overhead amounts to twenty percent of the sales, to cover which the mark up must be at least that much. Before the days of profiteering, an article costing one dollar on this basis would probably have been priced at \$1.25, the extra five cents being justified on various grounds.

At the end of the year these estimated costs are compared with the actual cost, and a fair basis arrived at for predicting the overhead of the ensuing year. For the merchant the problem of determining overhead is further complicated by the necessity of keeping separate records of various departments, but this feature will be ignored in order that the general principles of cost accounting may not be obscured by a multiplicity of details. In much the same way a

lawyer should estimate his overhead expenses. Assuming that the rent, light, taxes, salaries, supplies and other office expenses of a lawyer amount to \$1,500.00 per year, and that he puts in an eight-hour day except on Saturdays, when he closes at noon, and that he takes a two weeks' vacation, we have 50 working weeks of 52 hours each, making a total of 2,600 working hours over which to distribute the overhead of \$1,500.00. On this basis the lawyer must earn fifty-eight cents per hour in each and every working hour of the day before he can receive one cent of compensation for his own services. A lawyer with such an overhead should be able to withdraw a net income of at least \$3,000.00 per year, which, on a basis of 2,600 working hours per year, will require a charge per hour of \$1.16 for his own services and, including the overhead, a charge of \$1.74 per hour for each and every working hour in the year. Manifestly, he cannot actually charge clients directly with 2,600 hours of work per year, because a considerable portion of each day is spent in necessary labor that cannot directly be traced to any particular client. Assuming that two hours of each day cannot be directly traced, twenty-five per cent of the combined labor and expense charge of \$1.74 must be added to it, bringing the value of the lawyer's services per hour up to \$2.18. The lawyer with such data knows the value of his time, will be more careful in its conservation, and will see that every service bears its proper charge. It does not follow that the lawyer will bill his clients at \$2.18 per hour, or whatever his figure proves to be, as other elements already stated may influence the actual charge. The writer believes that if a survey were made of a number of representative law offices where a record is kept of all time consumed, that the average loss per day because of unaccounted time would be nearer fifty per cent than twenty-five per cent, but in order to be conservative he has based the assumed figures on the twenty-five per cent loss.

These figures exclude a very important item of expense that is universally included in mercantile cost accounting—the return on the investment. A manufacturer, establishing a new enterprise, not only expects a fair interest return on his invested capital, but if he has an up-to-date system of keeping his books will consider as having been added to that capital not only the cost of the plant and its equipment, but the lost interest on his funds during the six months or year during which his plant was in process of construction, and will add the difference between the fair return on his investment and the actual return during the two to five years during which his enterprise is getting started, and is not earning a fair interest on the investment. After the enterprise is once established, the manufacturer will expect more than a bare interest return on the invested capital, for he will expect compensation for the risk he took of losing part or all his principal, for he is not unmindful of the fact that a large percentage of such enterprises fail.

A lawyer, too, has a large capital invested in his business. On the expensive equipment of law books and office appliances, which depreciate rapidly and which have little value except to a going concern, he should earn, without labor on his part, the customary interest return on the investment plus the annual depreciation in his principal by reason of use and obsolescence. Besides this tangible capital, the lawyer has invested the direct and indirect cost of his education, which is just as much invested capital as is that placed in the factory by the manufacturer. The direct cost of the education is the tuition charges, board, clothing, railway fares and expense of books. The indirect cost should include the salary lost during the years in college (less the cost of board and clothing which has already been charged), and also the difference between the usual salary commanded by young men and that made by the lawyer during the early years of his practice, with interest on both direct and indirect cost of time when

the lawyer's income becomes sufficient to pay a return on his investment, and pay him an adequate salary for each day's labor. On such a basis, the average lawyer will find that his capital investment is much larger than he suspects. Save for the special study in acquiring an education, the lawyer could retain this capital for investment at current rate of return and, without labor on his part, be receiving the customary interest return. It is but fair for him to earn such a return on the investment in his education and office plant, in addition to compensation for his daily services as a trained and skilled professional workman. In a rough and ready way, lawyers have given consideration to these matters in fixing their fees, but no harm and much good can come from careful scrutiny and analysis of every item of expense and investment connected with the practice of our profession.

Many lawyers have been thinking of their office problems along the general lines of this paper, but too often their discoveries remain hidden in their own offices. The time is now ripe for the manifestation of the co-operative spirit shown by the candy manufacturer heretofore alluded to. Just how these hidden short cuts and efficiency methods are to be collected, and their relative merits made available to the profession, is a problem large enough for the American Bar Association, though not necessarily too large for a State Association. In the matter of office equipment and filing devices, every lawyer has no doubt purchased and then discarded perfectly good equipment that was unsuited to his requirements. Had he been able to refer to the report of an expert, employed by a State or the American Bar Association, explaining the equipment best suited to various types of law offices, he could have avoided many mistakes. In the matter of accounting and labor-saving forms, the report of an expert in such matters would be of even greater value.

Organizations in the mercantile world no larger than our own have employed experts

in their particular lines, and compiled and disbursed for the common good, information that no individual alone could have acquired, and if the writer does not mistake the trend of the times, our own profession must soon take similar co-operative measures.

WILMER T. FOX.

Jeffersonville, Ind.

MASTER AND SERVANT—WILFUL MIS-
CONDUCT.

KNOCKS v. METAL PACKAGE
CORPORATION.

131 N. E. 241.

Court of Appeals of New York. April 19, 1921.

Where a foreman charged an employee with responsibility for the defective operation of a machine, and the employee called him a liar and was knocked down by the foreman, compensation could not be denied under Workmen's Compensation Law, § 10, on the ground that there was a willful intention to bring about the injury.

CHASE, J. This is an appeal by an employee from an order of the Appellate Division, reversing, by a divided court, a unanimous award for compensation made by the State Industrial Commission and dismissing his claim under the Workmen's Compensation Law.

From the finding of the commission it appears:

That the claimant was employed by the Metal Package Corporation, a manufacturer of tin boxes. The claimant was employed as an offer of machinery at the plant of his employer. On June 11, 1919, he "was working for his employer at his employer's plant, and while engaged in the regular course of his employment oiling machinery, a seaming machine was running defectively because a superabundance of oil had been supplied to it, and the foreman of said plant * * * sent for claimant and escorted him to said machine, and indicated that the machine was not operating properly because too much oil had been supplied, and he told the claimant that he, the claimant, had supplied the oil and was responsible for the machine's defective operation.

"Answering the accusation the claimant called his foreman * * * 'a liar' and immediately his foreman struck claimant over the left eye and on the jaw and then threw him down the stairs. At the time of this assault claimant was wearing glasses, and the force of the blow delivered by the foreman over claimant's left eye shattered the glasses and pieces of same lacerated claimant's face

and left eyelid and the cornea of his left eye, and as a result claimant suffered a total loss of useful vision of the left eye."

The Commission also found that the injuries sustained by the claimant were accidental injuries and arose out of and in the course of his employment. The decision of the Commission is final on all questions of fact. Workmen's Compensation Law (Consol. Laws, c. 67) § 20; *Matter of Heltz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. The decision of the Appellate Division is to the effect that the findings do not sustain the award. It therefore dismissed the claim for compensation. The question for our determination is whether upon the findings the claimant did in fact receive an "accidental" injury "arising out of and in the course of employment." Workmen's Compensation Law, § 3.

The claimant's right to the award upon the findings of the Commission is directly sustained by the decision of this court in *Matter of Heltz v. Ruppert*, supra. In that case, as stated in the opinion therein:

The claimant was a driver for a corporation engaged in the business of carrying on a brewery. "He brought his horses into the stable, where Guth, a fellow workman, and he unharnessed the horses and proceeded to wash them off with the hose. Claimant told Guth he was using too much water on the horses, and Guth then intentionally sprinkled some water on claimant. Shortly after claimant, having briefly left the place where the horses were being washed, was returning to his work of cleaning the horses when he met Guth. As they passed claimant touched Guth on the Guth slapped claimant on the shoulder, and as shoulder, saying, 'George, don't do that again.' claimant turned around Guth's finger stuck in claimant's left eye, causing injuries by reason of which it was necessary to remove the eye."

The court said:

"That the injury was accidental within the meaning of the statute seems clear. It was a sudden and unlooked-for misfortune, and the purpose of the act is to insure the workman at the expense of the employer against personal injuries not expected or designed by the workman himself, provided such injuries arise out of and in the course of employment." 218 N. Y. 151, 112 N. E. 751 (L. R. A. 1917A, 344.)

The court further said:

"It was an obligation of claimant's employment to take care of the horses which he drove and to see that they were not injured by injudicious wetting or otherwise by his fellow workmen, that in course of their employment—while the two men were at work—a quarrel or argument over the wetting of the horses arose and personal injury grew out of the physical contact resulting from the quarrel, and that therefore the accident (a) arose out of and (b) in the course of employment." 218 N. Y. 153, 112 N. E. 751 (L. R. A. 1917A, 344.) 344.)

The court further said:

"Altercations and blows may, however, arise from the act of a fellow servant while both are engaged in the employer's work and in relation to the employment. The employer may be badly or carelessly served by two men engaged in his work, and yet it may be inferred, when one injures the other in a quarrel over the manner of working together in a common employment, that the accident arose out of the employment and was not entirely outside of its scope, if it was connected with the employer's work and in a sense in his interest." 218 N. Y. 153, 112 N. E. 751 (L. R. A. 1917A, 344.)

The injury to the claimant's eye was not designed, intended, or expected. It was an unlooked-for and untoward event and an accident within the meaning of the act. The assault by the foreman arose out of and in the course of the claimant's employment, as did the assault of Guth that followed the words of his fellow workman, Heitz, which were undoubtedly accepted by Guth as in the nature of a challenge. In the case now before us the controversy was in the factory during working hours and about the employer's work and the manner of doing it. The assailant was the foreman of the factory, and concededly acting as such at least up to the moment of the assault. When he sent for the claimant and escorted him to the machine that was said not to have been operating properly, the claimant was and continued to be engaged in the employer's business, and the foreman, when he charged the claimant with responsibility for the machine's defective operation, was also engaged in what seems to have been his duty as the person in control for the employer of the employees and the work in the factory. If the foreman was mistaken in his accusation against the claimant, the claimant could properly have denied that he was responsible for the machine's defective operation. Each seems, while performing his work and in discussing the employer's business, to have been equally hasty in becoming angry toward the other.

The claimant's use of an irritating word in making denial did not, however, justify either in law or in fact an assault upon him by the foreman. The foreman's duty as such to exercise reasonable discipline over the employees of the factory made possible a lack of discretion in performing such duty. The assault by the foreman was incidental to his employment as such. It grew out of his performance of his duty as foreman for the employer. It cannot be said as a matter of law or fact that the foreman, who up to the moment of the assault was properly engaged in the performance of his duty to his employer at that moment aban-

doned his duty and indulged in the assault as an individual act.

The employer should be responsible for an excitable and violent foreman in the prosecution of his duties as such, at least until there is sufficient interruption in the performance of such duties as to justify the conclusion that the foreman had abandoned his employment and that the assault was an independent and individual act as distinguished from acts within the terms of his employment. There was no intervening time between the acts and words of the assailant and the assailed and the injury in this case.

The conclusion here is less subject to a claim that the assault was a personal act than in the Heitz Case, where the assault did not occur until an intervening period of time after the first difference between the fellow employees. It arose in that case upon the return of Heitz and his statement to Guth in the nature of a challenge. There was no purpose by claimant in this case to bring about an assault nor a willful intention to bring about the injury within the meaning of section 10 of the Workmen's Compensation Law. The award made in this case upon the findings of the Industrial Commission is also sustained by the conclusion of this court in *Matter of Carbone v. Loft*, 219 N. Y. 579, 114 N. E. 1062; *Matter of Markell v. Green Felt Shoe Co.*, 221 N. Y. 493, 116 N. E. 1060; *Matter of Verschleiser v. Stern & Son*, 229 N. Y. 192, 128 N. E. 126; *Matter of Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711; *Swift & Co. v. Industrial Comm.*, 287 Ill. 564, 122 N. E. 796; *Pekin Cooperative Co. v. Industrial Comm.*, 285 Ill. 31, 120 N. E. 530; *McIntyre v. Rodger & Co.*, 41 Scot. L. Rep. 107.

The order of the Appellate Division should be reversed, and the award of the Industrial Commission affirmed, with costs in the Appellate Division and in this court.

NOTE—Meaning of "Wilful Misconduct" as Used in the Workmen's Compensation Statutes.—Most of the Workmen's Compensation statutes in the United States provide that wilful misconduct on the part of an employee resulting in his injury will bar recovery. In the English case of *Johnson v. Marshall & Sons*, (1906) A. C. 409, 75 L. J. K. B. 868, the court said, in relation to the meaning of the phrase, "wilful misconduct": "It was wilful in the sense that the matter presumably seemed of his own accord, but the word 'wilful,' I think, imports that the man's conduct was deliberate, not merely a thoughtless act on the spur of the moment."

"The act of going into an adjoining apartment falls far short of showing wilful misconduct. It evidences a mistake, and might afford proof of negligence on the part of the employee, but negligence is not involved in the question presented

for our determination." In *Re Ayers, Ind. App.*, 118 N. E. 386.

Where a reporter was riding on a trolley car to deliver a story to his employer, put his head out the window carelessly, or for his own ends, injuries sustained while so doing would have resulted from wilful misconduct; but such would not have been the case if his object was to see an aeroplane for the purpose of making a report to his employer in the line of his duty. *Kinsman v. Hartford Courant Co., Conn.*, 108 Atl. 562.

The use of a freight elevator by a female employee in leaving her place of work to go home, was not "wilful" within the meaning of the Maine Compensation Act. *Dulac v. Dumbarton Woolen Mills, Me.*, 112 Atl. 710.

One employed in a quarry who neglected to leave when the whistle blew for quitting time, and who knew that blasts were fired about ten minutes after quitting time, and who was delayed by boxes which he was carrying, and one of his children who came to meet him, and by stopping a moment to speak to another employee, and who was killed by being struck by a stone from a blast, was not guilty of serious and wilful misconduct, although his negligence in leaving the place was a violation of the rule of the employer. *Merlino v. Connecticut Quarries Co., Conn.*, 104 Atl. 396.

An employee of a Car Company who was crushed between cars which were standing at intervals on a track, and who had been warned that the cars were about to be moved, and who delayed in leaving to talk to another employee, was held not to be guilty of wilful misconduct. *Baltimore Car Foundry Company v. Ruzicka, Md.*, 104 Atl. 167.

An employee who went to the rescue of a fellow-employee, who was being overcome by gas in a vinegar vat was not guilty of wilful misconduct, although he did so against the protests and warnings of his foreman and several fellow-employees. *General Accident F. & L. Corp. v. Evans, Tex. Civ. App.*, 201 S. W. 705.

Where an employee was injured by acid while he was violating a rule of the employer requiring him to wear glasses, but the acid was still on his back and none was gotten in his eyes until it was attempted to pull his shirt over his head. The Court held that failure to wear glasses was not a contributory cause of the injury and he was allowed to recover. *Great Western Electro Chemical Company v. Industrial Acc. Comm., Cal. App.*, 170 Pac. 165.

See also in regard to failure to use proper guard on appliances on machine, *Haskell & Barker Car Company v. Kay, Ind. App.*, 119 N. E. 811; *Bayshore Laundry Company v. Industrial Acc. Comm., Cal. App.*, 172 Pac. 1128.

ITEMS OF PROFESSIONAL INTEREST.

THE LEGAL PROFESSION IN SCOTLAND

The welcome recently given by the Scots Bar to the leaders of Bench and Bar in England calls attention once more to the curiously dif-

ferent organization of the two Bars, English and Scots, which has grown up in the course of history. The English Bar has resulted from the permission given by the King's Bench, in the Middle Ages, to the Sergeants and Barristers-of-Law, in the numerous Inns of Court which then existed, to practice before them. The Inns of Court, in those days, like the colleges of Oxford and Cambridge, were hostels where law students lodged while engaged in the study of their profession. Such students were then called apprentices, and were one and all articulated to masters, whether barristers or attorneys. The rank of barrister was a degree like that of bachelor or master at Oxford. The sergeants corresponded to the later Benchers. How different the Scots Bar. To begin with, in Scotland, until the reign of James V, no Supreme Court existed. The sheriffs dispensed justice in the burghs and the feudal lords in the counties. Professional lawyers of any kind were quite unknown. It was James V who changed all this. In 1552 he set up the Court of Session (modelled on the French Parliament of Paris), and the High Court of Justice; these consisted of fifteen "Lords of Session" (since reduced to thirteen) and were the supreme civil and criminal courts respectively. Each Lord of Session is also a "Senator of the College of Justice," and as such goes on circuit to try the "Pleas of the Crown," i. e., murder, arson, robbery, rape. Lesser criminal offenses, whether indictable or summary, are tried by the Sheriff in the Sheriff Court and the Sheriff Police Court respectively; these correspond to the English Quarter and Petty Sessions. The Lord of Session was at first possessed of a seat in the Scots Parliament among the peers, but this right was not retained in later days. Once the Court of Session was formed, the Lords of Session promptly proceeded to admit two classes of lawyers to practise before them, namely, Advocates and writers of the Signet, who corresponded to the French "Avocats" and "Avouees." To this day the Court of Session consists of the Lord President, Lord Advocate, Lords Ordinary, Advocates, and Writers of the Signet. The Sheriffs copied the fashion of admitting privileged pleaders and formed county corporations of "writers" or "procurators," the urban and rural lawyers respectively, who have since been given the statutory name of "law-agents" and correspond to the English solicitors.

For some centuries after its foundation by James V, the Scots Court of Session was the great Institution of the country. The Scots Parliament seldom met and was never really powerful except in the reign of Queen Mary.

The Lords of Session formed great territorial families, known as the "Noblesse du Robe," as in France, and they gradually confined the membership of the Bar to scions of their families. An outsider would be admitted only by special grace. It was a great feather in Sir Walter Scott's cap when he, not a member of the privileged noblesse du robe, but the son of a Writer of the Signet, found his way to the Bar. It was not until 1832, indeed, that this exclusive privilege was done away with in Scotland. The modern advocate has to take, first an Arts and then a Law degree at a Scots University; this means six or seven years' study. Then he spends a "year of idleness," when he must follow no lucrative occupation; the old practice was for the "Intrant," as he was called, to spend his "year of idleness" at Leyden University in Holland, studying the Roman-Dutch system of law on which that of Scotland is modelled. But this practice no longer is universal; many intrants spend this year reading in chambers. At the end of the year, the intrant has to write a thesis in Latin on a "Title of the Pandects," and defend it before three advocates appointed by the faculty. He is then called, as in England. But the fees are much heavier, and increase with age. At 25 they are about £450, and the increase is about £25 per year thereafter. The reason is that the fee includes a single payment premium for insurance in favor of the advocate's "widow," and naturally the amount of the premium is larger as the intrant gets older. For this reason only young men seek admission to the Scots Bar. Beneath the Bar come two privileged bodies of lawyers who have the exclusive right of practice in the Court of Session, and one of whom has to sign every writ issued out of the court, namely the "Writers of the Signet" and the "Solicitors of the Supreme Court." Lastly come the Law-Agents, Writers or Procurators, who correspond to our solicitors. In Scotland a Writer or Procurator may become a Sheriff, and very often does so. He may even become a Lord of Session, but there have been no appointments in modern times outside the Bar. In Scotland it is not nearly so easy to change from Barrister to Solicitor, or vice versa, as in England; in fact the process of translation takes some years. The Scots Bar, curiously enough, elects its own head, the Dean of Faculty, thus following the continental practice. Generally speaking, it may be said, that the separation into three branches, instead of two, and the general "apartness" of those three branches makes the Scots legal profession more archaic than the English.—*Solicitor's Journal (London).*

REPORT OF THE MEETING OF THE NORTH DAKOTA BAR ASSOCIATION.

The annual meeting of the North Dakota Bar Association was held July 7th and 8th, 1921, at Grand Forks.

The annual address, given by Sir James Aikins, Lieutenant-Governor of Manitoba, was very interesting. His subject was: "The Development of the Red River Valley." Mr. E. A. Prendergast, of Minneapolis, made an address on "The Control of Public Utilities."

A recent act of the legislature of North Dakota permits the Association to organize as a state institution. No dues are required from members of the Association, but each practicing attorney pays to the state treasurer a license fee of \$15 per annum, and from this fund an appropriation is made to cover the expenses of the Association. By the act of the legislature all practicing lawyers who have paid the license fee become members of the State Bar Association, and at this meeting of the Association a new constitution and by-laws were adopted to conform to the new law.

In North Dakota the admission to the bar and discipline of members of the bar are under control of a board appointed by the governor. At this meeting of the Association there was a discussion of a proposed bill to give this control to the Bar Association, which hopes to have such an act passed within the next year or so.

Hon. Tracy R. Bangs of Grand Forks was elected as president, and Mr. John E. Greene of Minot, was re-elected as secretary and treasurer.

CORRESPONDENCE.

EXTRA LATERAL RIGHTS OF MINING CLAIMANTS

Editor Central Law Journal:

In your issue of August 12, 1921, page 96, in interpreting a decision of the U. S. Supreme Court in the case of *Silver King Coalition Mines Co. v. Conkling*, 41 Sup. Ct. 426, you make the following statement:

"When a prospector discovers a vein of ore on public lands, he is entitled to lay out a claim on the surface running parallel with the vein 150 feet long and 600 feet wide. If the apex of the vein is on the claim, the claimant may follow the dip of the discovery vein beyond the end lines but is not entitled to ore beyond the side lines."

Evidently the figures 150 referring to the length of the claim is a typographical error, as it should be 1500 feet.

However, as to the balance of the statement I beg to differ with you. When a mining claim is located along the course of the vein, 1500 feet long and 600 feet wide, that is to say 1500 feet along the course of the vein and 300 feet on each side thereof, and the apex of the vein is on the claim, the claimant may not go beyond his end lines at all, but is permitted to follow the vein on its dip outside of his side lines.

In case, however, that the prospector has misjudged the proper course of the vein and its strike or course is at right angles to the length of the claim, the end lines may be considered as side lines and he may follow the dip of the vein outside of his end lines, which in that case are considered his side lines. And this latter situation was the basis of the Supreme Court's decision, and is an exceptional case; in all other cases, where the claim is located in the ordinary manner, 1500 feet along the course or strike of the vein the claimant is not allowed to take out ore beyond his end lines.

I trust you will make the necessary corrections for the benefit of such members of the bar as may not be familiar with the mining laws and decisions.

Yours very truly,

Reno, Nev.

JAMES D. FINCH.

[We are glad to publish this correction. The law is correctly stated by our correspondent and the mistake in our note was due to oversight.—Ed.]

HUMOR OF THE LAW.

A captain in the merchant marine, who received much commendation for his courage and endurance during the war, was asked to address a meeting in the West. Ex-President Taft spoke first and at considerable length, and when he had finished the audience rose, almost to a man, to leave the building.

The chairman sprang to his feet, rushed to the edge of the platform, and called excitedly:

"Come back and take your seats. Come back, every one of you! This man went through hell for us during the war, and it is up to us now to do the same for him.—*Christian Register*.

A country club housewife hired a ducky to carry three tons of coal from the curb. A little later the housewife discovered that she had no money except a \$5 bill. Calling the ducky, who was about half through with the job, she asked him if he could change the bill so that he could get his pay.

"No'm," he replied, "I cain't. But I c'n git it changed over at de groc'ry sto'e."

The woman hesitated, trying to decide whether to take a chance.

"Don't yo' worry, missus," the ducky assured her. "I'll come back wid the change. An' just to show you it's all right, I'll go after it right now, and leave this other ton of coal I ain't carried in yet out in the street as s'curity."

"What are you doing?" asked the convict of the reporter, who was writing an account of the prison buildings.

"Only taking a few notes," was the reply.

"Take care, sir, that's what brought me here."
—*Edinburgh Scotsman*.

FOXY HIAWATHA.

Hiawatha had some nuggets
Run and gilded at a foundry
Where they molded brassy trinkets
To be sold to rural rubes.

Straightway to the station hied he,
Where the choo-choo wets its whistle,
And displayed his phony baubles
To the tourists' greedy gaze.

Then when shifty sharks besought him
To exchange his nifty nuggets
For their microbe-haunted greenbacks,
He would say, in accents guileless,
"Him heap pretty, bright and shiny,
"Worth much wampum as a keepsake
"To remember Hiawatha,
"Honestest of honest Injuns,
"And him very finest brass."

They remembered Hiawatha,
And in frenzy sent a marshall
To arrest him for sharp practice;
But our truthful, mirthful hero
Cracked a smile in friendly greeting,
Cracked a quart of fizzy bubbles,
Saying, "Paleface no believe me
"When I tell him that my nuggets
"Are but shiny, brassy keepsakes
"To remember Hiawatha,
"Honestest of honest Injuns,
"And the stingers sting themselves."
Then the merry-hearted marshall
Laughed until his kidneys jingled
And the hills gave back the echo;
Toasted him in sparkling bubbles,
Smoked a clear Havana peace pipe,
And departed with a chuckle,
Saying, "Though your wares be phony,
"Yet your wit is finest gold."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Attorney and Client—Payment of Money Awarded.**—An attorney who has been lawfully employed by a wife to represent her husband in a partition suit against both of them could lawfully pay the money awarded to the husband to the wife, and is not liable to the husband therefor.—*Buckhouse v. Parsons*, Mont., 198 Pac. 444.

2. **Bankruptcy—Discharge.**—A discharge granted without notice to creditors is invalid, and a petition by creditors for its revocation is not subject to the limitation of one year prescribed by Bankruptcy Act, § 15, for the filing of a petition for revocation of a discharge on the ground of fraud.—*John B. Ellison & Sons v. Weintrob*, U. S. C. C. A., 272 Fed. 466.

3. **Exemption From Arrest—Bankruptcy Act, § 9,** exempting a bankrupt from arrest on civil process on a dischargeable debt becomes effective at once on adjudication and entitles the bankrupt to discharge from imprisonment under a previous arrest on such a debt.—*Ex Parte Harrison*, U. S. D. C., 272 Fed. 543.

4. **Principal Place of Business.**—Where a mineral spring water company was incorporated in Ohio, in which its spring and producing plant was located, and where it conducted its banking and official business, and held its directors' and stockholders' meeting, and its articles named as its principal place of business an Ohio city, and it had an office and sold its product and capital stock in Kentucky, its "principal place of business," under Bankruptcy Act, § 2, subd. 1, was in Ohio, not Kentucky.—*In Re Devonian Mineral Spring Co.*, U. S. D. C., 272 Fed. 527.

5. **Principal Place of Business.**—Under Bankruptcy Act, § 2, subd. 1, where a Delaware oil company was licensed to do business in Kentucky, owned oil wells, and was engaged in the production of oil in that state, and was not licensed to do business in Ohio but merely maintained its corporate offices, kept its books and records, and held its stockholders', directors', and executive committee meetings, and directed its business there, the appointment of a receiver for it in Kentucky by the state court in June did not give the Ohio federal court jur-

isdiction to act upon its voluntary bankruptcy petition in the following May, on the ground that its principal place of business for the six months next prior thereto had been in Ohio; for its principal place of business, being in Kentucky prior to the receivership, was not by the appointment of the receiver, shifted to Ohio.—*In re Monarch Oil Corporation*, U. S. D. C., 272 Fed. 524.

6. **Banks and Banking—Forgery.**—Where plaintiff bank issued its cashier's check, payable to its customer moving to another point, and put it in the mail properly addressed to him at such other point, but it never reached him, and was presented to defendant bank by a negro, who forged the payee's indorsement and received part of the funds called for, having the rest on deposit, and defendant bank endorsed the check on the back with a guaranty of all prior indorsements, and transmitted it to plaintiff bank for payment, which was made, plaintiff bank, after discovery of the forgery, could recover from defendant bank for amount paid.—*Farmers' Bank & Trust Co. v. Farmers' State Bank of Brookport, Ark.*, 231 S. W. 7.

7. **Note of Another Bank.**—It is not illegal for one national bank to loan money and take a note therefor secured by the stock of another national bank.—*Citizens' Nat. Bank v. Stevenson*, Tex., 231 S. W. 364.

8. **Bills and Notes—Gambling Debt.**—The principal that a note for a gambling debt cannot be collected does not extend to suits by an innocent indorsee for value and holder in due course, against the indorser on his contract of indorsement, which is by virtue of C. S. § 3047, a contract independent of the instrument on which it appears, and guarantees that the note is a valid and subsisting obligation.—*Wachovia Bank & Trust Co. v. Crafton*, N. C., 107 S. E. 316.

9. **Interest.**—When an instrument provides for interest, it runs from the date; where no interest is reserved, interest runs from the date of maturity at the legal rate; and interest on a demand note runs from the time of demand.—*Jacobs v. Murray*, Del., 113 Atl. 803.

10. **Negligence of Bank.**—Failure of creditor bank to notify its debtor that a note had not been paid until after the death of one to whom the debtor had intrusted funds for its payment and who had misappropriated them, held not actionable negligence available as a defense in an action on the note.—*Shaw v. First State Bank*, Tex., 231 S. W. 325.

11. **Carriers of Goods—Delivery.**—Where a car, on arrival at destination, was placed on a public delivery track and notice given a consignee, who accepted the car, broke the seals, and started to unload, there was no delivery of property still in the car, but only a right of access given to it. In order that it might be removed.—*Michigan Cent. R. Co. v. Mark Owen & Co.*, U. S. S. C., 41 Sup. Ct. 554.

12. **Carriers of Passengers—Negligence.**—Whether an automobile owner storing his car on the third floor of defendant's garage, was guilty of contributory negligence in injecting his head through an opening between the upper and lower doors of the elevator to shout down the shaft, after efforts, repeatedly exerted by means of ringing the bell, to have the elevator brought to his floor had proved futile, the doors closing and injuring him by some action of the elevator on the lower floor, after having remained stationary for 15 minutes held for the jury.—*Telch v. Seidman's Garage*—N. Y. 188 N. Y. S. 488.

13. **Charities—Testamentary Trust.**—Testamentary trust for benefit of two named missionary associations and "other moral and useful associations" held a valid charitable trust, notwithstanding the words "other moral and useful associations"; such words being insufficient to allow the fund to be applied to noncharitable purposes, in view of the ejusdem generis rule.—*Prime v. Harmon*, Me., 113 Atl. 738.

14. **Commerce—Interstate.**—Where a railway roadmaster engaged in taking an inventory of materials on the property of the road, all of which was in one state, was also engaged in supervising the keeping in repair of a track, engaged in interstate commerce, he was em-

ployed in "interstate commerce."—*Louisiana Ry. & Nav. Co. v. Williams*, U. S. C. C. A., 272 Fed. 439.

15. **Conspiracy—Trade With Indians.**—Even if Rev. St. § 2078, prohibiting an employee in Indian affairs from having any interest in trade with the Indians does not create a criminal offense, but merely subjects the offender to an action for a penalty, a conspiracy to engage in such trade is a conspiracy to commit an offense against the United States within Criminal Code, § 37, since a combination to accomplish a purpose, either criminal or otherwise unlawful, is within the accepted definition of conspiracy.—*United States v. Hutto*, U. S. S. C., 41 Sup. Ct. 541.

16. **Constitutional Law—Contractor's Bond.**—Rev. St. art. 3623a, as added by Laws 1915, c. 143, § 2, in so far as it provides that no change or alteration in the plans, building construction, or method of payment shall affect the liability under a contractor's bond, is unconstitutional.—*Southern Surety Co. v. Nalle & Co., Tex.*, 231 S. W. 402.

17. **License Tax on Dogs.**—An act, imposing a specific license tax upon dogs, providing for the destruction of those on which the taxes were not paid, and those preying on domestic animals, and making the owner liable for the damages caused by the latter, does not violate the due process of law clauses and special immunities.—*McQueen v. Kittitas County, Wash.*, 198 Pac. 394.

18. **Contracts—Impossibility of Performance.**—A promisor is bound to perform his contract unless it was unlawful when made or has since become impossible of performance through no fault of his, which impossibility may be caused, not only by governmental act, but also by decree of court, provided such decree is not induced by the contractor's own act or fault; mere inconvenience or difficulty of performance not being enough, and the promisor in an honest effort to carry out his agreement being under duty, if possible, to procure dissolution of an injunction against him effectually preventing performance, or to secure dismissal by removing the cause therefor.—*Peckham v. Industrial Securities Co., Del.*, 113 Atl. 799.

19. **Corporations—Doing Business Within State.**—Laws N. C. 1917, c. 231, § 72, imposing a license on automobile manufacturers, which provides that the license on such manufacturers who have invested three-fourths of their assets in state securities or in personal property within the state shall be only one-fifth of the amount imposed on others, unjustly discriminates between foreign corporations manufacturing outside of the state, but doing business therein by selling their products, since a foreign corporation could not comply with the condition for the reduced license, while a domestic corporation could and therefore the act denies the equal protection of the laws guaranteed by Const. Amend. 14.—*Bethlehem Motors Corporation v. Flynt*, U. S. S. C., 41 Sup. Ct. 571.

20. **Worthless Stock.**—Where a complaint by a buyer is brought to recover as damages the moneys paid therefor, induced by the fraudulent representations of defendants, and proofs show such representations, that the stock was practically worthless, and that plaintiff suffered very considerable damages, he is entitled to a rescission and may recover the amount paid in such case, without showing the difference between what the stock was worth at time of purchase, and what it would have been worth if the alleged representations were true, the allegation in the complaint that he was "damaged" in a specified sum which was the amount paid for the stock, not necessarily meaning unliquidated damages, so as to preclude recovery if he failed to prove damages as a consequence of the alleged fraud and deceit.—*Haessig v. Gregory*, N. Y., 188 N. Y. S. 500.

21. **Damages—Breach of Contract.**—The rule that when a contract calls for personal services, the party employed is required, in case of breach by the other party, to use reasonable efforts to obtain other employment to lessen damages, does not apply to a trucking contract calling for no special skill or personal services and performable by the contractor's employees.

—*Mount Pleasant Stable Co. v. Steinberg*, Mass., 131 N. E. 295.

22. **Deeds—Gift.**—Where the testimony shows that it was never the decedent's intention to revoke a gift of land to the defendants, but that she intended it to be absolute and outright, and the project of giving the property was her own and originated by her without suggestion of either of the grantees, it was not required that she have independent advice before making the transfer, and the absence of a clause of revocation is without moment.—*Barnard v. Kell*, Pa., 113 Atl. 836.

23. **Divorce—Modification of Decree.**—Where, on appeal from a decree awarding a divorce from bed and board only, the pleadings and the findings of fact of the district court are sufficient to sustain a decree of divorce from the bonds of matrimony, this court may modify the decree so as to award an absolute divorce.—*Marquis v. Marquis*, Neb., 182 N. W. 1020.

24. **Easements—Encroachment on Passageway.**—The fact that fire escapes, which were placed upon a hotel building so as to encroach on a passageway adjoining it, were placed on the building in obedience to St. 1907, c. 550, § 12, does not relieve the owners of the hotel from their obligation to refrain from encroaching on the passageway, even if it involves great pecuniary loss.—*New York Cent. R. Co. v. Ayer*, Mass., 131 N. E. 325.

25. **Elections—Unauthorized Candidate.**—When a candidate or an elector neglects to take steps, under section 398, Gen. St. 1913, to have the name of a person not entitled to appear on the official ballot stricken therefrom, he cannot after the election is held raise a valid objection to counting the votes properly marked for such person; there being no claim that the latter had violated any provision of the election laws.—*In Re Johnson*, Minn., 182 N. W. 987.

26. **Eminent Domain—Damages to Abutting Land.**—Under the Constitution as amended in 1876, to provide that a person's property shall not be taken or "damaged" for public use without adequate compensation, unless by his consent, damages to the land abutting on a highway from elevation of the roadway by a viaduct and approach thereto are recoverable.—*Dallas County v. Barr*, Tex., 231 S. W. 453.

27. **Explosives—Violation of Ordinance.**—In view of Rev. Codes, § 6192, 10 year old boy injured in the discharge of fireworks, in violation of an ordinance prohibiting the sale and discharge of fireworks, could not recover damages on the ground that the storekeeper who sold the fireworks was negligent in selling them in violation of such ordinance; the boy in such case being equally in the wrong, in that he himself violated the ordinance, without which wrongful act the injury would not have been sustained.—*Jackson v. Lomas*, Mont., 198 Pac. 435.

28. **Insurance—Good Health.**—Applicant taken with influenza not in "good health" within policy condition of delivery during applicant's good health.—*Denton v. Kansas City Life Ins. Co., Tex.*, 231 S. W. 436.

29. **Military Service.**—The insurance policy in suit is construed as not excepting a risk resulting from the insured entering military service in time of war without the written consent of the company, but as imposing in such event a condition which the company might waive if it chose, and that evidence that the company after notice of the death of the insured in service wrote the beneficiary in terms consistent with the view that the policy was in force and inconsistent with a claim of present forfeiture, and, as if it intended to pay, asked her to send formal notice of death, and later asked her to send formal proofs of death, which she obtained with some trouble, justified a finding of waiver.—*Bowman v. Surety Fund Life Ins. Co., Minn.*, 182 N. W. 991.

30. **Raise of Rates.**—Where an insurance certificate issued by a fraternal society did not name any fixed rate of assessments, but provided for payment of all assessments and dues levied, the society had a right to levy dues and assessments necessary to pay all matured claims and provide the funds required by the constitution and by-laws and did not break its con-

tract by levying higher dues and assessments than those originally fixed, especially where it gave the member the option of paying the old rate by consenting to a reduction of benefits or the creation of a lien against his certificate, as provided in Park's Ann. Civ. Code, § 2504 (mm).—*Sealy v. Sovereign Camp, W. O. W., Ga.*, 101 S. E. 417.

31.—"Vessel Hazard."—In an employer's accident insurance contract excluding liability for injury to employees of a packing plant received through "vessel hazard," where the employee was repairing an idle boat at plant premises and was injured by a kettle top in the plant building while on mission in connection with repairing the boat, such injury was not within the "vessel hazard" clause.—*Employers' Liability Assur. Corporation v. American Packing Co., Miss.*, 88 So. 481.

32.—Interest—Coupons.—The general rule is that negotiable interest coupons, attached to or detached from bonds, bear interest from and after their respective maturity dates.—*Hamilton v. Wheeling Public Service Co., W. Va.*, 107 S. E. 401.

33.—Intoxicating Liquors—Jamaica Ginger.—Chapter 256, Laws 1912, imposing penalties to be recovered in a civil action where the sale or giving away of "spirituous" or "vinous" liquors is permitted, embraces preparations of whatever name, containing alcohol in large quantities, which are sold as beverages. It applies to Jamaica ginger, which contains only pure alcohol and the essence of ginger, where it is sold as a beverage and not as a medicine.—*Payne v. State, Mass.*, 88 So. 483.

34.—Preparation for Household Use.—A harmless preparation of general use for toilet or household purposes, and sold by merchants, does not become an "intoxicating beverage," within the meaning of the statute, because so used occasionally or in rare instances; but, if it is an intoxicating beverage, its sale is prohibited. It cannot be assumed as a matter of law that Jamaica ginger is commonly used as a liquor for drinking, and therefore is an intoxicating beverage.—*Commonwealth v. Landis, Mass.*, 131 N. E. 302.

35.—Search of Residence.—Under National Prohibition Act, tit. 2, § 25, providing that no search warrant shall issue to search any private dwelling unless used for the unlawful sale of intoxicating liquor, or used in part for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding house, a private dwelling does not lose its character as such, and become a distillery, because a home-made still is found in operation upon a search.—*United States v. Keli, U. S. D. C.*, 272 Fed. 484.

36.—Landlord and Tenant—"Apartment House."—"Apartment houses" are generally understood as those houses which contain apartments to which is attached a kitchen, wherein it is contemplated that the family shall do its own cooking while an "apartment hotel" is generally understood to apply to those houses which contain nonhousekeeping apartments without a kitchen or cooking facilities, wherein the proprietor furnishes a restaurant for feeding the occupants of the different apartments.—*Waitt Const. Co. v. Chase, N. Y.*, 188 N. Y. S. 589.

37.—Damage by Tenant—A landlord whose property has been damaged during the tenancy through the negligence of the tenant is entitled to recover from him such sums as will reasonably compensate him for the damage caused by the tenant's negligence.—*Hill v. McKay, Del.*, 113 Atl. 805.

38.—Legality of Bond.—Where a tenant averts eviction by filing his counter affidavit and bond, he cannot question the legality of his own bond on the ground that it should have been approved by the sheriff and not by a constable.—*Crider v. Hedden, Ga.*, 107 S. E. 345.

39.—Notice to Renew Lease.—Where only two of the several lessees gave notice of desire to continue under an agreement to renew, such notice will be deemed valid and binding, the lessees remaining as the same, the notice having been given for the benefit of all.—*Kozy Theatre Co. v. Love, Ky.*, 231 S. W. 249.

40.—Logs and Logging—Entire Contract.—If the contract executed contemporaneously with the deed in such case recites the conveyance of the timber and reservation of the vendor's lien, as above described, and a sale by the acre for a sum in excess of the price recited

in the deed, and of all of the logging and manufacturing equipment at a price equal to the cost thereof, to be later ascertained, and then provides that the residue of the price of the timber and the price of the equipment so to be fixed shall be paid monthly at a certain rate per 1,000 feet for the lumber shipped, upon monthly statements, the contract is entire.—*Acadian Coal & Lumber Co. v. Brooks Run Lumber Co., W. Va.*, 107 S. E. 423.

41.—Master and Servant—Employment of Infant.—An infant is not estopped from prosecuting a common-law action for injuries while he was employed in violation of the law by insisting in that action that the master, who had instituted proceedings before the Compensation Board to have compensation awarded to the infant, was concluded by the Board's finding that the employment of the infant was willful and in known violation of law, though the Board had no jurisdiction to make such finding after the infant had previously elected to proceed at common law.—*Louisville Woolen Mills v. Kingden, Ky.*, 231 S. W. 202.

42.—Enticing Servant.—In an action brought by an employer against a third person for willfully interfering with, enticing, or knowingly employing a servant (who had entered into a contract for a given period), without obtaining the consent of the employer, it was error to charge the jury that it would find for the plaintiff if the defendant at the time of the hiring "knew or ought to have known that said contract had not expired." The words of the statute "shall willfully interfere with, entice away, or knowingly employ" mean that the party hiring must have known of the contract at the time of the hiring and not that he might have known by diligent or reasonable inquiry. The knowledge must exist at the time of the hiring.—*Beale v. Yazoo Yarn Mill, Miss.*, 88 So. 411.

43.—Extra-hazardous Work—A general storage and warehouse business held not so extra-hazardous in character as to warrant the Industrial Insurance Commission to declare it to be such within the Workmen's Compensation Act Rem. Code, 1915, § 6601-2, as amended by Laws 1919, c. 131, authorizing the commission to declare a business not enumerated to be an extra-hazardous business under the act.—*State v. Byres Storage & Distributing Co., Wash.*, 198 Pac. 390.

44.—Negligence of Master.—In an action under St. 1919, § 2394-48, for injuries to plaintiff's hand caught in the wringer of an electric washing machine, evidence that a safety device was installed on the machine similar to that of many other types of such machines, and that the form of guard suggested by plaintiff's expert witness had been discarded by practically all manufacturers for the one installed, which seemed more adequate for the purpose, did not justify a finding of the jury that the wringer, in the usual and customary manner of using it was not as free from danger as the nature of the work reasonably permitted.—*Hahn v. Rothstein, Wis.*, 182 N. W. 983.

45.—Mechanics' Liens—Contractor and Materialman Distinguished.—One who contracts to furnish the steel work for a building and who is required by his contract to "fabricate" a substantial part of it according to the plans and specifications for the building is a contractor as distinguished from a materialman under the Mechanic's Lien Law.—*Illinois Steel Warehouse Co. v. Hennepin Lumber Co., Minn.*, 182 N. W. 994.

46.—Municipal Corporations—Adverse Possession.—Under Rev. Codes §§ 6432, 6435, construed in conjunction with section 3259, a prescriptive right can be built on public use of land for streets and thoroughfares, when jurisdiction has been acquired by a city and maintained for 10 years, and such proprietorship for such time fully satisfies sections 1337 and 1340, providing a general rule for establishing or vacating highways, and the jury's verdict of such adverse possession by a city must stand where the evidence is insufficient to overcome the presumption of such open and notorious adverse occupation.—*Stettinmer v. City of Butte, Mont.*, 198 Pac. 455.

47.—Defective Sidewalk.—A slope of seven inches in a cement sidewalk approaching the flagstone portion of the walk at a crossing where plaintiff slipped and was injured did not

constitute a defect rendering the city liable for plaintiff's injuries.—*Polian v. City of Milwaukee, Wis.*, 182 N. W. 978.

48.—**Negligence.**—It is negligence to leave open a cellar door in a much-frequented pavement, without precaution being taken to protect the hole; so, where defendant's servants opened a doorway in the sidewalk, and plaintiff, who was carrying a heavy box out of a building, backed into the opening, defendant is liable, unless it had a servant on guard to warn plaintiff of his danger, or plaintiff failed to use ordinary care for his own safety.—*Commonwealth Power Ry. & Light Co. v. Vaught, Ky.*, 241 S. W. 247.

49.—**Street Paving.**—Street paving is a class of betterment for which a railroad right of way and station property is subject to assessment.—*Choctaw, O. & G. R. Co. v. Mackey, U. S. C.*, 451 Sup. Ct. 582.

50.—**Negligence.**—Starting of Elevator.—An electrician employed by an independent contractor who was working in and about an elevator shaft in defendant's building was entitled to due warning of the starting of the elevator.—*John R. Coppin Co. v. Richards, Ky.*, 231 S. W. 229.

51.—**Newspapers.**—"Legal Daily Paper."—A newspaper published every day except Monday may be a legal "daily newspaper" for the publication of legal notices within the meaning of Laws 1921, c. 99, providing that no newspaper shall be considered a legal newspaper unless it shall have been published continually (legal holidays and Sundays excepted) as a daily or weekly newspaper for at least six months, etc.—*City of Bellingham v. Bellingham Pub. Co., Wash.*, 198 Pac. 369.

52.—**Principal and Agent.**—Exclusive agency.—Contract whereby plaintiff gave defendant an agency for the sale of homemade candies etc., will not be canceled, either because she misunderstood some of its terms or it failed to prove as profitable as expected.—*Dutch v. Gamage Brokerage Co., Me.*, 113 Atl. 785.

53.—**Authority of Agent.**—A contract employing an agent and giving him authority to make contracts for his principal does not impliedly authorize him to accept, in settlement of the account arising from contract an amount less than was due.—*Hoshor-Platt Co. v. Miller, Mass.*, 131 N. E. 311.

54.—**Railroads.**—Insufficient Bridge.—The fact that the same abutments for a bridge carrying a highway over railway tracks had existed for more than 40 years does not justify their continuance by the railroad under Rev. Laws, c. 53, § 1, when they were too narrow to accommodate the traffic.—*Boston & M. R. R. v. County Com'rs, Mass.*, 131 N. E. 283.

55.—**Suitable Waiting Room.**—A waiting room provided by a railroad at a station is not suitable or convenient for waiting passengers, within Ky. St. § 772, requiring the railroad to provide suitable waiting rooms, if it is too small, dark, stuffy, dirty, or indecent.—*Commonwealth v. Louisville & N. R. Co., Ky.*, 231 S. W. 236.

56.—**Receiver.**—Cannot Sue Outside Jurisdiction of Appointment.—A receiver has no standing as a litigant outside the jurisdiction of the court of his appointment.—*United States Mortgage & Trust Co. v. Missouri, K. & T. Ry. Co., U. S. C. C. A.*, 272 Fed. 459.

57.—**Sales.**—Indefinite Contract.—Where contract for sale of cartons to be shipped in monthly installments over a period of months gave seller the right to change the prices for any 60-day period according to market conditions subject to buyer's right to cancel balance of contract on failure to agree to changed price buyer's failure to assent to increased prices on seller's revision thereof and to recognize seller's right to make such revision operated as a cancellation of the unfilled orders.—*National Can Co. v. Robert Gair Co., Md.*, 113 Atl. 858.

58.—**Title to Shipment.**—Where wheat is purchased and shipped by rail consigned to shipper's order, and drafts for the price are sent through banks, with bills of lading attached, and such drafts are paid by the purchaser, and bills of lading delivered to him, title passes to the purchaser, notwithstanding that the wheat must be measured or weighed at destination to definitely determine the exact sum to be paid for the entire mass.—*Fort Worth Elevators Co. v. Keel & Son, Tex.*, 231 S. W. 481.

59.—**Street Railroads.**—Rights of Pedestrians.

—Vehicles and pedestrians at crossings must be highly vigilant to observe approaching danger, but a pedestrian is not restricted to the use of established street crossings when attempting to pass from one side of the street to the other.—*Gavin v. Philadelphia Rapid Transit Co., Pa.*, 113 Atl. 832.

60.—**Taxation.**—Foreign Corporation.—Under the rule that the taxable value of shares of stock of a corporation is ascertained by deducting the value of its tangible property otherwise assessed from the market value of its shares of stock, the capital stock of a foreign corporation was not taxable where the value of such stock did not exceed the aggregate value of its other property assessed in the state, and the corporation did not own other property elsewhere.—*State v. Eagle Lumber Co., Ark.*, 231 S. W. 180.

61.—**Telegraphs and Telephones.**—Efficient Service.—Telephone companies are under the duty of furnishing to their subscribers reasonably prompt and efficient service in giving them connections with other subscribers, and they are liable for any pecuniary loss directly traceable to a breach of such duty as the proximate cause.—*Peterson v. Monroe Independent Telephone Co., Neb.*, 182 N. W. 1017.

62.—**Limitation of Liability.**—Even if the limitation of liability of a telegraph company for error in the transmission of a repeated message is invalid, because there is no rate on file at which a message can be transmitted without limitation of liability, that fact does not invalidate the limitation of the telegraph company's liability for the transmission of an unrepeatable message to the amount of the toll received by it.—*Western Union Telegraph Co. v. Esteve Bros. & Co., U. S. C. C.*, 41 Sup. Ct. 584.

63.—**Trusts.**—Joint Account.—Where the owner of a bank account has the same transferred to a joint account for himself and another with provision for survivorship, such act creates a trust; the entry, unexplained being a sufficient declaration of trust because it indicates an intention to establish a trust.—*Coburn v. Shilling, Md.*, 113 Atl. 761.

64.—**Vendor and Purchaser.**—Restrictive Building Covenants.—In a suit for specific performance of a contract of sale, where the issue is as to whether or not the lands are subject to certain restrictive building covenants, depending upon the ascertainment of the true construction and legal operation of an ill-expressed and inartificial instrument, specific performance will not be decreed against vendee unless the court be satisfied beyond all reasonable doubt that the lands are free from the alleged incumbrance.—*Smith v. Reidy, N. J.*, 113 Atl. 774.

65.—**Waters and Watercourses.**—Change of Stream.—While a private individual has a right under certain circumstances, to protect himself against overflow, surface, and outflow waters, he cannot so change a stream in an effort to protect his own property, as that he will thereby flood or erode the property of some one else.—*Conger v. Pierce County, Wash.*, 198 Pac. 377.

66.—**Wills.**—Gift to Class.—Where a testator devised lands to his children with direction that, if any one or more should die without issue, then to the survivors, and, if all should so die, then to his heirs, the gift to the heirs is to a class, which is to be determined as of the date of the testator's death; consequently the gift over is one to the testator's children as they were his heirs, so partition proceedings between the children whereby the rights of survivorship etc., was barred and released is binding, and the children receive indivisible titles.—*Raugham v. Trust Co. of Washington, N. C.*, 107 S. E. 431.

67.—**Marketable Title.**—Under a will. "I hereby bequeath to my beloved wife, A., all my estate, real, personal and mixed, of whatsoever kind or wheresoever situate, and, upon the death of my wife, the residue thereof shall be divided equally between our two children, V. and M., or the survivor of either," wife had power to consume all or any part of the property devised and hence had the right to convey real estate.—*Edwards v. Newland Pa.*, 113 Atl. 742.

68.—**Payment for Nursing.**—Provision for payment of "any doctor bills" of testatrix's brother from a trust fund established by her will held to include a claim for nursing.—*Haines v. Indiana Trust Co., Ind.*, 131 N. E. 89.

Central Law Journal.

St. Louis, Mo., September 23, 1921.

MAKING THE LAW A LEARNED PROFESSION.

Probably the biggest thing accomplished by one of the greatest of all meetings of the American Bar Association at Cincinnati, Aug. 31-Sept. 3, 1921, was the raising of educational requirements for admission to the bar to two years' college work and three years of legal instruction.

The effort to raise the educational standards of lawyers has been made more than once in the American Bar Association, but only the slightest restrictions have been added from time to time. It was a most difficult matter to get the bar gradually to raise the entrance requirements from the grammar school standard to graduation from an approved high school, and two years of legal study. Most of the states have at least this minimum qualification, although there are a few, with Indiana at their head, which unfortunately have not set up even this minimum standard.

But the American Bar Association prepared for a big fight this year on the question whether the profession of the law shall continue to rank with the learned professions, or sink to the level of a trade. With this object in view, at least so it was charged by the opponents of the new standard, Mr. Elihu Root was made the chairman of the Section on Legal Education, and Chief Justice Taft attached himself to the section in order to take part in this debate.

The writer has been a member of this section for about ten years and is familiar with the sources of the strong opposition to raising the educational standards for admission to the bar. The first group are the law schools who are not members of that exclusive circle known as the Association of American Law Schools, which in-

cludes all the great private or state endowed universities. The other opposing group consists of those lawyers who had not the advantages of college or law school training but who had attained a fair measure of success and, therefore, did not believe they would be consistent in keeping out of the profession worthy young men who, if given the opportunity, might be able to make a reasonable success in practice at the bar.

There can be no doubt that the supercilious attitude of the greater law schools toward the Section on Legal Education and especially the withdrawal of such association from the group of allied associations which hold their annual meetings jointly with the American Bar Association, has had much to do to prejudice some members of the bar to any and all recommendations which have proceeded from this source. The success of the most recent effort at Cincinnati therefore is due, without doubt, to the fact that the recommendations came from practicing lawyers.

The recommendations of the committee, of which Mr. Root was chairman, are now by their adoption by the American Bar Association, by a vote of six to one, the standards to be sought for in every state. They are as follows:

"1. The American Bar Association is of the opinion that every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:

"(a) It shall require as a condition of admission at least two years of study in college.

"(b) It shall require its students to pursue a course of three years' duration if they devote substantially all their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to studies.

"(c) It shall provide an adequate library available for the use of students.

"(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

"2. The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

"3. The Council of Legal Education and Admissions to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not, and to make such publications available so far as is possible to intending law students.

"4. The president of the association and the Council on Legal Education and Admissions to the Bar are directed to co-operate with the state and local bar associations to urge upon the duly constituted authorities of the several states the adoption of the above requirements for admission to the bar.

"5. The Council on Legal Education and Admissions to the Bar is directed to call a conference on Legal Education in the name of the American Bar Association, to which the state and local bar associations shall be invited in an effort to create conditions favorable to the adoption of the principles above set forth."

The sharp conflict over these recommendations was in the Section on Legal Education. This section is composed of law school men of every rank, bar examiners and others particularly interested in the subject of legal education. There were in attendance more than a hundred representative men from almost every section of the country. Mr. Elihu Root and Chief Justice Taft opened the debate in behalf of the committee's recommendation. Then Mr. Edward I. Lee of Chicago, and Mr. Charles F. Carusi of Washington, D. C. deans of law schools which have evening sessions, opened the attack on the committee's recommendations. These speeches were followed by others which deprecated the attempt to keep out of the profession worthy young men too poor to acquire two years' of college education. Even some of the law school deans opposed the resolution, and when Dean Albers of the Boston University Law School joined the group attacking the recommendations of the committee, it looked as if the report was likely to be

adopted only after an amendment reducing the pre-legal qualification to graduation from an approved high school.

It was at this point, however, that the tide turned, and the man who helped to spoil the plans of the opponents of a higher educational standard for lawyers was a stranger to most of those present. He came from the town of Henrietta, Texas, and his name, which was called for loudly after he had finished his speech, was Joseph S. Dickey, Jr. Mr. Dickey, being small of stature, did not make much of an impression when he arose to speak, but he had not proceeded far in his speech before he had nearly the entire section with him. "I'm sick and tired," said Mr. Dickey, "of having the doctors, dentists, preachers, chiropractors and others boast that only educated men can join their profession, but that it takes no great amount of learning to be a lawyer. If that be true then I have been deceived. When I sought admission to the bar I was told that the law was one of the learned professions and that was one of the compensations which induced me to forsake other means of livelihood and become a lawyer. I still believe that the law is a learned profession; I still believe that in the long run it takes an educated man to succeed at the bar, and that it is almost criminal to encourage the uneducated man with promises of success. Feeling that way about this matter, I am for the committee's report from top to bottom and only regret that our profession has been so slow in setting up at least a minimum standard of scholarship for those who shall enter it."

Mr. Dickey's plea was to the professional pride of the lawyer, and in the face of that appeal the Abraham Lincoln argument fell flat. Mr. Taft punctured the Abraham Lincoln argument by saying that if in Lincoln's day the opportunities for learning were as cheap and as accessible as they are today, and two years of college had been required to enter the bar, Lincoln would have met the qualifications. "Men of the type of Lincoln cannot be kept out of the profession by hurdles of this kind," said Mr. Taft. "The

only men which a high educational standard will keep out are men who are looking for a quick and easy way to practice the profession for the money there is in it, and who, in the great majority of cases, are the class from which the ambulance chaser is recruited."

When the vote was taken in the section meeting the recommendations were adopted by about two to one. When the recommendations came before the general body of the Association, composed of nearly a thousand representative lawyers from every section of the country, the recommendations passed by an overwhelming majority. At no meeting of the Association was the enthusiasm for a movement to raise the educational standards for admission to the bar so great as it was at Cincinnati.

Most lawyers, we are sure, will rejoice at the success which has attended Mr. Root's efforts to raise the educational standards of the profession. It was, indeed, impossible, that the profession should stand by while commercial law schools, through misleading advertisements, were inducing thousands of intellectually unprepared young men to embark on the practice of a profession where, by reason of such unpreparedness, they are, in this day at least, doomed to certain shipwreck.

It will be observed that the Committee does not condemn evening schools. They simply declare that all schools, day or evening, shall maintain a certain standard of scholarship; otherwise its students and graduates shall not have the right to take the bar examinations. One state, Kansas, it was announced by Mr. W. E. Hutchison of Garden City, Kans., had already in effect adopted the standards approved by the American Bar Association, to go into effect in 1922. Now, let every lawyer do his best to secure the adoption of the same standard in his own state, until the time shall come, as Mr. Dickey declared, when we shall not hesitate as lawyers to claim our proper standing among the learned professions of the earth.

NOTES OF IMPORTANT DECISIONS.

INJUNCTIONS TO PREVENT A BREACH OF A LAW TO WHICH A PENALTY IS ATTACHED.—Many laws passed by the legislature in the exercise of the police power have penalties attached for violations thereof. They are the so-called "conventional" offenses. For instance, the laws requiring persons seeking to practice certain trades and professions to take out license, usually provide a fine or imprisonment in the county jail, or both, for the failure to take out such license. These penalties seldom restrain the violation of such laws, since those for whom the services are rendered have no incentive usually to prosecute. A recent case raises the question whether equity can enjoin the practice of such trades or professions on the ground that such practice constitutes a public nuisance. The decision, we refer to, is that of the Georgia Supreme Court and holds that unless it is shown that the practice of such trade or profession by the particular individual charged with practicing without a license is in fact injurious or dangerous to the public, an injunction will not be issued simply to prevent the violation of the law. *Dean v. State*, 106 S. E. Rep. 792.

In this case the defendant was offering his services to the public as a chiropractor with the assurance that he could heal or ameliorate certain diseases of the body. He failed to secure a license to practice medicine and the state sought to enjoin him from practice on the ground that for anyone to practice medicine without taking the examination and taking out a license was dangerous to the public welfare and that therefore he should be enjoined therefrom as a public nuisance. In denying the state's contention, the Georgia Court says:

"It may also be said that a nuisance is either public or private or mixed. It may likewise be said that a public nuisance is one which causes hurt, inconvenience, or damage to the public generally, or such part of the public as necessarily come in contact with it. It is obvious that a nuisance may be public though it does not necessarily consist in any act or thing which does in fact cause hurt, inconvenience, or injury to all of the public; generally it is sufficient if it injures those of the public who may come in contact with it. These general principles may be subject to certain limitations, but it is unnecessary to notice the limitations here. Before the first medical act of Georgia (Ga. Laws, 1880-81, p. 172), it was not illegal to practice medicine as such in Georgia without examination and without license. The treatment of diseases according to the chiropractic method cannot be classed as a common or public nuisance. It is not per se a nuisance.

The chancellor has refused to find in this case (even if it be conceded that he was authorized so to find) that the treatment of persons according to the chiropractic method, as practiced by plaintiff in error, was harmful to his patients, or to any part of the public, or to the public generally as noted above. The mere fact that the plaintiff in error in practicing his profession without a license may be guilty of a misdemeanor will not authorize a court of equity to enjoin him from practicing his profession. If the medical acts of this state are applicable to the plaintiff in error, he is amenable to criminal prosecution. Unless the Legislature sees fit to extend the jurisdiction of equity or to enlarge the category of public nuisances, equity will not enjoin the plaintiff in error from practicing his profession simply because in so doing he is violating the penal laws of the state."

RECENT DECISIONS IN THE BRITISH COURTS.

There have been an interesting series of master and servant cases recently. *McKeating v. Frame*, 1921, 1 S. L. T. 218, was an action of damages against an employer in respect of the death of a domestic servant from pneumonia. The Lord Ordinary held that the plaintiff had not stated a relevant case, but the Second Division have, however, sent the case for jury trial. In the course of his opinion the Lord Justice-Clerk said: "Nor can I agree with the Lord Ordinary's views as to the master's duty to provide medical attendance for a servant who is unwell. It was, perhaps, quite true that a master was not bound in law to provide medical attendance for his sick servant, but nowadays all he requires to do is to notify the panel doctor. It is averred that on the Monday, the day on which the defendant ordered the girl to leave for home, he was in Shotts himself. I do not know whether the panel doctor resided in Shotts; I should think that is very likely. At any rate, he could easily have sent word to the panel doctor that there was at his farm a sick person entitled to medical assistance." It seems to us that this innovation on the common law is one which the changing social conditions and relations between master and servant may well be held to justify.

In the last-mentioned case the Lord Justice-Clerk made the following observations in regard to procedure at jury trials: "I should like to add this, that, in cases of this sort which come here on a question of relevancy, I do not think any of the observations that fall from the bench ought to be put before the jury at all, for we are giving our opinions upon what is really an *ex parte* statement. The Lord

Ordinary will no doubt have what is said before him, and will give effect to the views expressed, insofar as he thinks proper, in his charge to the jury."

The Workmen's Compensation Act of 1906 awards compensation for injury by accident arising out of and in course of a workman's employment. The point in *Dennis v. Midland Railway*, 1921, 37 T. L. R. 623, was whether the circumstances leading to the employee's death constituted an accident. An engine driver, who had to take out an early train, was usually awakened in time by one of the railway cleaners, but one very cold morning he was not called until it was nearly too late, and he hurried off without sufficient clothing and without food. He drove the train, but took pneumonia and died. The railway company had nothing to do with the arrangement for awakening the driver. It was held by the House of Lords that although there had been an accidental failure to awaken the man in proper time, there had been no accident in the course of his employment, and his dependents were not, therefore, entitled to compensation.

It has already been held that a deliberate assault causing injury or death may be an accident in the sense of the Workmen's Compensation Act. Another decision to this effect has been given by the Court of Appeal in *Reid v. British and Irish Steam Packet Co.* A quay foreman in charge of two or more gangs of dock laborers claimed compensation for injury by accident, having been assaulted by a laborer to whom he had given an order. He had been in the employment of the respondents for many years, and at the time of the "accident" was being paid £21 a month. His duties were mainly to direct and supervise the work done, but he was expected occasionally to give manual assistance, if required. It was held, that on the evidence the employment involved risk of assault from a rough class of men, and therefore the accident arose out of the employment. The Master of the Rolls stated as the Court's reasons for this finding that there was evidence that the men over whom the applicant had to exercise supervision and discipline were a rough lot. All persons who had any acquaintance with dock laborers would recognize that they probably would be a rough lot. It was true, however, that no evidence was given of any previous assault on a quay foreman, but there was such an assault on a ship's foreman, and it was not likely that those men would make any distinction between one kind of foreman and another. It seemed to him (his Lordship) that the assault was an acci-

dent arising out of the employment, the applicant having a rough class of men to supervise. There was, at any rate, a possibility that the supervisor who controlled the men would be assaulted—a possibility greater than that a member of the general public would be assaulted.

The same case is of importance as showing the effect of the increased remuneration of employees on their position. Under the Compensation Statute (the benefits of which do not extend to non-manual workers earning over £250 per year) the employers claimed that the workman was outwith the statute, as he was remunerated on a rate exceeding £250 a year. He was at the time of the accident earning £21 a month, and he would continue to earn £21 a month until his employment was determined by notice—i. e., one month's notice. It was argued that there must be evidence either that he had actually earned £250 in one year, or else that he could not have his employment terminated by notice for such a period that he would have earned £250 in a year before it was terminated. *Griffith v. Owners of Sailing Ship Penrhyn Castle* (1917, 1 K. B. 474), and *MacKay v. S. S. Cramond* (13 B. W. C. 99). But the facts in these cases were different. Lord Justice Scrutton said in the former case: "To satisfy the words of the Act it must be shown that there is a contract of employment, which, unless determined by notice, or by some extraneous fact, such as death, or the destruction of the subject-matter of the contract, will last a year and produce a remuneration of over £250, and it is not enough to show a contract for less than a year at less than £250, as, for example, a six months' contract for £150."

In the present case the Court were of opinion that the remuneration clearly exceeded £250 a year. The firm were thoroughly satisfied with the applicant, whom they had employed continuously for 21 years. The appeal, therefore, was allowed on the ground that the workman was employed otherwise than by manual labor at a remuneration exceeding £250 a year.

The question of injury while drunk has proved troublesome. Sheriff-Substitute Orr annexed to his award in the workmen's compensation case of *Scrimgeour v. William Thomson & Co.*, 1921, 1 S. L. T. 310, the following pertinent note: "This case appears to me to belong to the class of cases of which *Nash*, 1914, 3 K. B. 978, is an example. The facts of the two cases bear a strong resemblance to one another. I think this accident had

nothing to do with *Scrimgeour's* employment except that it occurred more or less in the place of his employment, that is, as he was going on board the ship. Though it may therefore be said to have occurred 'in the course of his employment, it did not arise out of it. It arose entirely out of the man's state of drunkenness—a dazed and semi-drunken state which was sufficient to prevent him stepping on board with safety—a thing which other men in a more sober condition found no difficulty whatever in doing that night." The Court of Session have recalled the Sheriff's judgment, and held that the workman's injury arose out of his employment and, though he had also been guilty of serious and willful misconduct, yet, as the accident had been fatal, that did not prevent his representatives recovering compensation. This decision, as the Court expressly said, is not intended to prejudge a case in which the circumstances establish that the workman's state of intoxication is the sole cause of a misadventure which befalls him in the course of his employment. This was held to be the situation in *Frith v. Owners of S. S. "Louisianian,"* 1912, 2 K. B. 155. There the workman's state of intoxication was so far advanced as to amount to complete physical incapacity, and, although the accident might be held to have arisen in the course of his employment, the decision was that it did not arise out of it.

Nevertheless, the judgment makes it very difficult to say when intoxication will deprive a claimant of the benefit of compensation. The arbitrator's findings in fact might, it seems to us, be very well allowed to stand as justifying the conclusion at which he had arrived.

The Lord President put the ground of decision as follows: "That the consumption of the liquor by the workman was a circumstance conducive to the accident is clear. But the accident consisted in the fall from a high ladder, and falls from high ladders and the like are among the risks to which his employment peculiarly exposed him—drunk or sober. It is true that the risks arising out of any employment are enhanced by circumstances in the workman's condition which impair his control of his own movements, and a workman who comes to his work so much the worse of drink as to be unfit to perform it, may properly be held guilty of serious and willful misconduct if he suffers from an accident to which his unfitness has conduced. But this provides no reason for concluding that the accident does not arise out of the employment, and if (as happened here) the accident results in

his death, his misconduct, even though serious and willful, is of no account."

DONALD MACKAY.

Glasgow, Scotland.

THE 1921 MEETING OF THE AMERICAN BAR ASSOCIATION.

The meeting of the American Bar Association at Cincinnati was an unusual success from many points of view. First it was the most largely attended—over 1,200 registered delegates. Second, it was the hottest, from the standpoint of actual temperature; third, it was thoroughly representative of the bar. There were in attendance more State Supreme Court judges than ever before and the active participation in the proceedings, by men like Elihu Root of New York, Senator Sutherland of Salt Lake City, Chief Justice Taft of Washington, Frederick W. Lehmann of St. Louis, Senator Thomas of Colorado, Prof. Wigmore of Chicago, Former Ambassador Davis of West Virginia, and many others, caused the discussions to prove interesting and profitable.

COMMISSIONERS ON UNIFORM STATE LAWS

The Conference of Commissioners on Uniform State Laws met the week previous to the Association meeting. Thirty-eight states were represented by duly appointed representatives, three to each state. Hon. Henry Stockbridge of Maryland presided.

No new laws were promulgated by the Conference but considerable progress was made upon bills which have been pending before the Conference for several years. The finishing touches upon the Uniform Corporation Act were made at this session and it is expected that the act will be finally approved and adopted at the session next year.

The influence of the Conference was shown by the large number of legislative proposals that were presented to the Committee on Scope and Program. Most of these proposals were new and untried

schemes for social or political reform and it was necessary to inform the proponents of these measures that the Conference could not participate in any reform propaganda. The only exception made to this rule was the acceptance of an invitation extended on behalf of the National Chamber of Commerce and other business organizations that the Conference consider the advisability of preparing a Uniform Arbitration Law. A special committee was appointed to consider this question of which Mr. Alexander H. Robbins, of St. Louis, editor of the Central Law Journal, was appointed the chairman.

Three new uniform acts appeared before the Conference for the first time in the shape of tentative bills, namely, the First Tentative Draft of a Uniform Fiduciaries Act, the First Tentative Draft of a Uniform Mortgage Act and the First Tentative Draft of a Uniform Aviation Act.

The Aviation Act received very earnest consideration and provoked an interesting discussion. Manufacturers of aeroplanes, as well as aviators, united in urging the Conference to complete this act in time for its passage next year. Army aviators from Ohio entertained the Conference at McCook Field, Dayton, Ohio, with demonstrations of the use and practical needs of aviation and Prof. Bogert of Cornell University, Chairman of the Committee on Aviation, together with several members of his committee, made several flights in order to observe the practical working of the aeroplane.

The Conference also fully considered a Second Tentative Draft of a Uniform Declaratory Judgments Act and sent it back to the Committee with several important amendments. It is thought that this Act will be ready for final action next year.

THE AMERICAN BAR ASSOCIATION MEETING

The Association opened its session in the Ball Room of the Hotel Sinton by standing silent and reverent for a few minutes out of respect for the memory of its deceased President, William A. Blount of

Pensacola, Fla. Mr. Hampton L. Carson, of Philadelphia, a former president of the Association, called the meeting to order. The address which took the place of the President's Address on the program was delivered by Mr. James M. Beck of New York, Solicitor General of the United States.

PRESIDENT HARDING'S GREETING.

President Harding sent a letter of greeting to the Association which was received with many comments of approval. The President wrote:

"Nowhere is there crystallized, I believe a finer conception of freedom under the law, a broader, more human and unselfish purpose of service, progress and betterment than in the American Bar Association.

"Here we find attested the highest ethics of a noble profession. These are the only ethics that have ever found expression in your activities: and from your annual meetings they have reflected to court, consultation and bar everywhere. They have lighted the way to legislative achievement, administrative advance and a constant, conservative measure of social progress.

"It will not overstep the proprieties of such a note as, this, I trust, if I suggest how our very civilization at this time, need a firm adherence to these lofty aims by those who, like ourselves, are particularly equipped to help direct these social and political operations. We would be blind, indeed, if we did not recognize that there is a tendency to examination and inquisition even of traditions and institutions that once were held elemental, almost sacred.

"No greater influence than your own could be arrayed in favor of openminded, disinterested inquiry into the justification for these criticisms, and if you adopt a liberal attitude toward such inquiries you will be the more potent in safeguarding the good that we possess and rightly shaping the measures of progress that we must have."

SECTION OF CRIMINAL LAW.

This section was presided over by Mr. Edwin M. Abbott, of Philadelphia. Among several interesting addresses was that of Mr. Edwin W. Sims, President of the Chicago Crime Commission, who declared that prompt trials and certain punishment of criminals would do more than anything else to reduce crime. He says in part:

"Existing criminal laws in America are the evolution of centuries of practical experience. As they have been developed they are invaluable. There are those, however, who attack the theory of punishment and who, contending that crime is a disease, recommend and urge that punishment be abolished and some other form of treatment substituted. It is a grave mistake to interfere in any way with, impede or hamper the enforcement of, existing laws which have been centuries in development, at least until the experiment has been thoroughly tested and found to be practical.

"Three years ago the Chicago Association of Commerce appointed and financed a Crime Commission. The commission does not of itself undertake the apprehension nor the prosecution of criminals. It limits its activity to an investigation of crimes of violence, murder, burglary and robbery. It early reached the conclusion that crime flourished because criminals escaped punishment and that the principal avenue of escape was the delay in the trial of criminal cases.

"On April 1, 1920, 135 persons, previously indicted for murder, were awaiting trial in Chicago. In 104 cases the accused were at liberty on bond. The situation was brought to the attention of the courts and officials by the Crime Commission, with the result that four judges then in the Civil Courts volunteered to sit in the Criminal Court and try cases until the murder docket was cleared. The trial of these cases resulted in the sentencing of 12 to hang and 12 to the penitentiary for from one year to life.

"The effect on the number of murders in Chicago was electrical. Immediately the murder rate there dropped 51 per cent where it has since remained. The record for the first seven months of each of the last three years is as follows: 1919, 232; 1920, 87; 1921, 91."

The following officers were elected by the Criminal Law Section: President, Floyd E. Thompson, Rock Island, Ill., W. O. Hart, of New Orleans, La., Vice President; and Edwin M. Abbott, of Philadelphia, Secretary and Treasurer.

ENTERTAINMENT AT CINCINNATI.

As this report of the meeting at Cincinnati is purposely discursive, this is as good place as any to break in with a tribute to Cincinnati's hospitality and especially that

of the lawyers of the Cincinnati and Ohio State Bar. Province M. Pogue, President of the Cincinnati Bar Association and Dan W. Iddings of Dayton, Ohio, President of the Ohio Bar Association were "on the job" all the time in taking care of the visiting lawyers. Mr. Iddings made such an impression on the Louisiana delegation that they publicly presented him with a beautiful memento of their esteem.

The climax to the unusual hospitality extended to this Conference was the trip to Dayton and the entertainment of the entire Conference at lunch at the plant of the National Cash Register Company, and in the evening at an alfresco dinner on the beautiful lawn of John H. Patterson.

WOMEN LAWYERS AT CINCINNATI.

There was a larger attendance of women lawyers than ever before in the history of the Association and one of these, Miss M. Pearl McCall of Boise, was the first woman ever elected to the General Council. She was the only lawyer from the State of Idaho present at this meeting and the suggestion of several leaders of the bar was urged to put up her own name as representative from Idaho and the nomination was approved by the Association.

Two judges from Washington, D. C., both women, were Judge Mary O'Toole of the Municipal Court and Judge Catherine Sellers of the Juvenile Court.

ATTORNEY GENERAL DAUGHERTY ON THE VOLSTEAD ACT.

The press dispatches, quoted largely from the closing part of the address of Attorney General Daugherty in respect to the enforcement of the Volstead Act. Here are the exact words of the Attorney General on this point:

"Another subject that undermines respect for law, especially prominent at the present time, is an erroneous theory of personal liberty under our constitutional system. This controversy is as old as government itself. It has been asserted with especial vigor recently owing to the Eighteenth Amendment to the Constitution of the United States and to the amendments

in the various state constitutions, and because of legislation on the same subject by Congress and the various State Legislatures.

"The question of the limitations of personal liberty is, in the first instance, a question of political philosophy and not of law. The advocates of personal liberty have ranged all the way from those who favor the widest measure of license to the individual to do as he pleases on the one hand, to those who would restrict the individual by the most puritanic standards on the other hand. There is no quarrel on my part with any of these groups. As long as life, personality, individual endowment of mind or heart differ, there will be differences of opinion among the constituent members of society on questions of this sort. As long as they remain purely speculative questions in the realm of the political philosophy proposed by their respective advocates as the basis for social organization, there is and can be no objection to them. Every one has a right to advocate any view that he pleases on this subject. However, when public sentiment has crystallized into law, there can be no question as to the duty of good citizens with reference thereto. They may still debate as to the wisdom of the law, but there is only one course of conduct, and that is obedience to the law while it exists.

"In order that the weight to be attached to the argument of those persons who claim their personal liberty is invaded by legislation of Congress and the various State Legislatures, it may be profitable to refer to the history of this sort of legislation. In the evolution of government we have gradually limited the sphere of individual liberty. A study of the history of legislation wherein personal liberty has been limited by statute will show that these enactments have been vigorously challenged and the same arguments have been used against violation of personal liberty that we hear today. For example compulsory education laws, anti-duelling laws, anti-gambling laws regulating social relations and practically all the abridgments by statute of the common law have in the past been opposed by the argument that we now hear, namely that they are violations of personal liberty.

"Let me be not misunderstood. I do not mean to impute moral turpitude to him who is opposed to the Eighteenth Amendment or similar amendments in our state constitutions, or who is opposed to the Volstead

act or similar legislation in our states. All I mean to say is that the argument of undue abridgment of personal liberty, advanced today, has in the past been advanced by every champion of lawlessness who has sought to find an excuse for unlawful conduct.

"My duty is clear. As long as I am the responsible head of the Department of Justice the law will be enforced with all the power possessed by the government which I am at liberty to call to my command."

SIR JOHN SIMON.

Sir John Simon, the leader of the English bar, was very popular with the lawyers at Cincinnati. He is a barrister with the most lucrative trial practice in England, and his methods of speaking were such that he was able to hold the largest audiences spellbound by the clearness of his thoughts and the interesting manner of their presentation. He spoke on many different occasions. In most cases he avoided shop talk, and attempted the solution of no profound problems, and yet his remarks were interesting and entertaining.

On one occasion, in referring to the "ancient grudge" of Americans toward England, he said:

"In the early American days there was a movement to repudiate the common law because it came from England. It would be as reasonable for Americans to repudiate the game of golf because it comes from Scotland; instead of which the authors of your independence lost no time in making a tee-shot into Boston Harbor and naming one of your early battlefields Bunker Hill."

In referring to the obligation resting on the lawyer to take an interest in public affairs, he said:

"A man's livelihood should not be the whole of a man's life. It is the temptation of this feverish age to pursue the means of life so eagerly as to forget the end of life. I confess myself to be one of those who thinks that it should be part of a man's religion that his country should be well governed, and that in practicing this part of his religion, he should not pray cream on Sunday and live skimmed milk the rest of the week. It is the glory of the bar that its training and discipline are capable of producing and in times of crisis have often pro-

duced men whose brief has been Liberty and whose client has been Humanity."

In delicately referring to the World Conference on disarmament Sir John said:

"An enlightened public opinion ought now to be directed to the folly, the risk and the burden of bloated and extravagant expenditure upon the machinery of war. If there be any community or nation which desires to make good its claim to be the moral leader of the world that title would indeed be justly earned by the nation amongst us which shows the way by an actual and substantial reduction of excessive expenditure on preparations for war. Other nations would follow, and children yet unborn would rise to call those blessed who pointed out the true path of peace."

His sense of humor is very keen. At the banquet Friday night it was very warm, and Chief Justice Taft was perspiring freely, and in spite of his smile and chuckle, appeared quite uncomfortable. Sir John was speaking, and in the midst of his address, addressing the Chief Justice, said:

"Mr. Chairman, the name of your beautiful city, which this week has extended to us such a warm welcome, recalls to my mind the classic memories of the Roman plow boy called to lead the Roman Republic in a time of great stress and trial. Cincinnati was in the field when the notification committee' (that is what you call it in this country, I believe) came to announce his election. It was a hot, summer day, and the new president-elect, so tradition tells us, was clad in nothing but the summer breezes and a breech cloth. As I have sat here this evening looking at your melting and beaming countenance the thought passed through my mind [here the audience began breaking into laughter and cheers] whether you, in particular, my dear Mr. Chairman [more laughter], have not more than once this evening regretted [more laughter and cheers, Mr. Taft joining in heartily] the passing away of the simpler customs of an earlier day?"

CHIEF JUSTICE TAFT'S PLEA FOR MORE
FEDERAL JUDGES.

Chief Justice Taft played the part of one of the hosts to the lawyers at Cincinnati. He was at all the sessions, took part in many of the debates, and presided

at the final banquet on Friday night. His greatest speech probably, was in behalf of the resolution endorsing the appointment of eighteen federal judges-at-large and giving the Supreme Court visitorial powers over the lower federal courts. On this point the Chief Justice said:

"The congestion which exists in many of the districts of the United States—and it has been growing because of the gradual enlargement of the jurisdiction of the courts under the enactment by Congress of laws which are the exercise of its heretofore dormant constitutional powers—has been greatly added to by the adoption of the Eighteenth Amendment and the passage of the Volstead law. Something must be done therefore, to give the Federal Courts a judicial force that can grapple with these arrears and end them.

"The Attorney General has been much impressed with the great increase in business in the courts, and has recommended to the President and to Congress the adoption of a law which it seems to me will much facilitate the dispatch of business in the courts of the United States.

"Of course those courts have been aided, I suppose, by the workmen's compensation act of the United States, which has transferred to a different tribunal the settlement of controversies that took up much of the time of the courts in jury trials; but the other causes of increase in business have been so great that the number of cases pending is startling in its growth and size. The bill which the Attorney General has presented to Congress, and which has now been introduced by the Chairman of the Judiciary Committee of the Senate, adds to the judicial force of the United States, two District Judges-at-large in each circuit, or eighteen in all.

"They are to have and exercise all the powers of District Judges except that they may not make appointments of clerks and other officers, which should obviously be made by Judges knowing the vicinage. They are, as all Judges must be, appointed or created, under the judicial power of the United States, granted by the third article of the constitution, Judges for life, but the provision of the new bill is that when they die or resign, their successors shall not be appointed unless Congress shall affirmatively so decide.

"This is as temporary a provision for a Federal Judge as the constitution will per-

mit. These Judges-at-large are to be assigned by the Senior Circuit Judge of their circuit to any district in their circuit when needed, and by the Chief Justice to any district in any other circuit.

"In the bill is another important feature that in a sense contains the kernel of the whole progress intended by the bill. It provides for an annual meeting of the Chief Justice and the senior Circuit Judges from the nine circuits and the Attorney General, to consider the required reports from District Judges and Clerks as to the business in their respective districts, with a view to making a yearly plan for the massing of the new and old judicial force of the United States in those districts all over the country where the arrears are threatening to interfere with the usefulness of the courts.

"It is the introduction into our Judicial system of an executive principle to secure effective teamwork. Heretofore each judge has paddled his own canoe and has done the best he could with his district. He has been subject to little supervision if any. Judges are men, and some are not so keenly charged with the duty of constant labor that the stimulus of an annual inquiry into what they are doing may not be helpful.

"With such mild visitation a Judge is likely to co-operate much more readily in an organized effort to get rid of business and do justice than under the 'go-as-you-please' system which has left unemployed in easy districts a good deal of the judicial energy that may be, under this plan, usefully applied elsewhere."

THE NEW OFFICERS.

Mr. C. A. Severance, of St. Paul, was elected President of the Association; Mr. W. Thomas Kemp of Baltimore, was elected Secretary and Mr. Frederick E. Wadhams of Albany, N. Y., Treasurer. It will interest our readers to know that Mr. Thomas W. Shelton of Norfolk, Va., was elected to a three-year term on the Executive Committee. Mr. Shelton also gave a dinner to Sir John Simon, reciprocating the favors extended to him (Mr. Shelton) on his recent visit to England.

CRITICISM OF JUDGE LANDIS.

One of the resolutions that raised considerable discussion but was finally passed was the resolution condemning Judge Kenesaw M. Landis for his acceptance of em-

ployment as the supreme arbiter of baseball. The resolution was presented by the acting President, Hampton L. Carson of Philadelphia, and provided as follows:

"Resolved, That the conduct of Kenesaw M. Landis in engaging in private employment and accepting private emolument while holding the position of a Federal Judge and receiving salary from the Federal Government meets with our unqualified condemnation as conduct unworthy of the conduct of a Judge, derogatory to the dignity of the bench and undermining the public confidence in the independence of the judiciary."

Mr. Carson declared that such action on the part of Judge Landis destroyed the moral effect of the Code of Ethics unless it was unequivocally condemned by the Association. Former Senator J. Hamilton Lewis of Illinois pleaded for a more careful investigation and a hearing before the Association acted but his motion to that effect was defeated and Mr. Carson's resolution adopted.

A. H. ROBBINS.

MASTER AND SERVANT—WORKMEN'S COMPENSATION.

CAPONE'S CASE.

Supreme Judicial Court of Massachusetts. Suffolk. July 5, 1921.

132 N. E. 32.

If an employee's injury prevented his pursuing his former employment, or if, by reason of business conditions, he could not secure work at his former occupation, and his ability to labor in other pursuits was impaired by the injury, this circumstance was important in determining the amount of wages he could earn, and should be taken into account in deciding what compensation should be awarded him because of his diminished capacity to work, under St. 1914, c. 708, § 5 (Gen. Laws, c. 152, § 35).

CARROLL. J. The employee was injured while working on a milling machine on April 29, 1920. As a result of his injury the first phalange of the ring finger on the left hand was amputated. His average weekly wages were \$24.96. He was paid compensation to December 2, 1920. On a rehearing of the case

it was found that the injured finger was sensitive, the stump thinly covered with skin, and that there may be a filament of "nerve caught in the end or near the surface where it strikes when the hand is working"; that the employee obtained employment in a grocery store but was unable to do the work because of the condition of his finger, and on this account cannot perform "general heavy work"; and that he has a partial earning capacity of \$12 a week. He was awarded compensation of \$8.64 a week, that being two-thirds of the difference between \$12 and his former weekly wages of \$24.96 from December 3, 1920, to January 3, 1921. To continue under the provisions of the statute, the insurer appealed from the decree of the superior court affirming the findings of the Industrial Accident Board, on the ground that there was no evidence that the employee was incapacitated from doing the work of operating a milling machine, at which work he was employed when injured.

Statute 1914, c. 708, § 5 (G. L. c. 152, § 35), provides that while incapacity for work resulting from the injury is partial, the injured employee shall receive a weekly compensation equal to sixty-six and two-thirds per cent of the difference between his average weekly wages before the injury and the average weekly wages he is able to earn thereafter. When the employee was injured his work was that of operating a milling machine. If, on December 3, 1920 (from which time he was found to be partially incapacitated for labor), he was in fact able to operate such a machine and could secure employment at this work, then there was no incapacity to labor resulting from the injury. But if his injured finger prevented his pursuing his former employment, or if by reason of business conditions he could not secure work at this occupation and his ability to labor in other pursuits was impaired by his injuries, this circumstance was important in determining the amount of wages he could earn and should be taken into account in deciding what compensation should be awarded him because of his diminished capacity to work. Reduction in earning capacity occasioned by general business conditions and not due to the injury could not be considered. The statute contemplates that compensation is to be paid for diminished capacity to earn wages; and the employee, in common with others, must bear the loss resulting from business depression. Durney's Case, 222 Mass. 461, 111 N. E. 166. If, however, the employee could not return to his former employment because of business conditions and sought for or secured employment elsewhere which he could perform, if it were not for his inability

because of his injury, his earning power and labor efficiency were lessened within the meaning of the statute, and he was entitled to the compensation provided. *Sullivan's Case*, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378; *Duprey's Case*, 219 Mass. 189, 106 N. E. 686; In *Barry's Case*, 235 Mass. 408, 126 N. E. 894, it was found that the employee was no longer able to do the work at which he was employed when injured; that in the general labor market his capability to earn wages was diminished; and the decree awarding compensation on this ground was affirmed. See *Sullivan's Case*, *supra*; *Duprey's Case*, *supra*; *Septimo's Case*, 219 Mass. 430, 107 N. E. 63. In the case at bar it has been found that because of the employee's injury his earning capacity was reduced; but the record does not show that he failed to secure work at his former employment, or that his efficiency in that work was in any way impaired. In our opinion the case should be recommitted to the Industrial Accident Board for further hearing on this point. So ordered.

NOTE—*Higher Wages After Injury as Affecting Employee's Right to Compensation*.—Whether or not the right of an employee, partially incapacitated from labor, to compensation is affected by the fact that subsequent to the injury, he is earning more than before the injury depends upon the provisions of the statute under which his claim is made. In some states this fact does not affect his right to compensation. *Epsten v. Hancock-Epsten Co.*, Neb., 163 N. W. 767, 15 N. C. C. A. 1067; *Dennis v. Cafferty*, 99 Kan. 810, 163 Pac. 461; *Sauvian v. Battelle*, 99 Kan. 810, 164, Pac. 1086; *Joliet Motor Co. v. Industrial Board*, 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 75.

In the *Sauvian* case, *supra*, the Court said: "It is settled that, when one is totally or partially incapacitated for hard manual labor, he is not to be denied compensation because he obtains employment even at better wages at a task which he is physically able to perform."

In other states this fact is taken into consideration. In *re Dove*, Ind. App., 117 N. E. 210.

ITEMS OF PROFESSIONAL INTEREST.

JUDGE WILLIAM C. HOOK

A gentle soul was dear Judge Hook,
His life was pure as crystal brook,
With dignity and simple poise,
He lived his life without much noise.

When he decreed, with natural grace,
He made the Bench a holy place.
With mind trained solely for the Right,
He kept the Wrong clear out of sight.

Both just to foe and fair to friend,
Ever careful not to offend.
He ne'er bore any man a grudge,
And always was an upright judge.

Tall, stately, thoughtful, man of God,
All lawyers loved his friendly nod.
But all knew they had him to fight,
If their cause was not just and right.

He believed in Constitutions,
As the peoples' institutions.
And no void act by him could pass,
Regardless of the clash of class.

With love of country dominant,
For principle always adamant.
Off duty he loved wholesome play,
For he knew "EACH MAN HAS HIS DAY."

With justice as his guiding star,
He knew how weak we mortals are.
Whether or not he gained the palm,
His rule was ever to be calm.

Why should he bear the yoke of 'must,'
When he to all men was so just—
But as he said, 'tis nature's plan,
Which "deals alike with every man."

Rest, gentle Judge, till Judgment Day.
"Your Honor," long with us will stay,
You'll live in hearts you leave behind,
With those who knew you just and kind.

EDWARD J. WHITE.

St. Louis, Mo.

BOOK REVIEWS

CARNEGIE BULLETIN ON "TRAINING FOR THE PUBLIC PROFESSION OF THE LAW."

The 15th Bulletin of the Carnegie Foundation for the Advancement of Teaching has been eagerly awaited by those members of the legal profession who desire to see an advance step taken in respect to the standards of admission to the bar. This bulletin deals most thoroughly with all the problems of legal education and should be in the hands of every law school instructor, the members of all boards of law examiners, and the members of all committees of local bar associations having under consideration the question of the legal, mental and moral qualifications of those seeking admission to the practice of the law.

Among the many interesting findings of this particular investigation is that the law is not a private, but a public, profession, and should be kept accessible to the people. The investigators find that the fact that no limit is placed

upon the number of lawyers admitted to practice is the one feature that distinguishes these "officers of the court" from governmental officials proper, who enjoy their special privileges during good behavior and are compensated by fees. The problem of the training and testing of lawyers forms thus a subordinate part of the broad problem of the method of recruiting the civil service. This problem of governmental organization presents in a democracy peculiar difficulties, because while a democracy, equally with other forms of government, needs competently trained servants, unlike other forms of government it demands also that access to the public service shall not be restricted to that element in the population that can afford to take a long and laborious course of preliminary training. Prior to the Civil War this latter demand was emphasized at the expense of efficiency and of a sense of professional responsibility, both in the civil service proper and in the bar. Since then, there has been a movement to stimulate these qualities through more stringent rules for admission to the bar.

The study is divided into eight parts, of which the first is in the nature of a general summary. The law of England, and the English system of legal education as this existed prior to the American Revolution, are first discussed, and subsequent developments in both England and Canada are then briefly summarized, as a background against which our own divergent development can be made clear. Following this, Part II traces the development of our present systems of bar admission. Part III contains a detailed account of the origin of law schools, and Part IV, of bar associations, including a description of the organic weaknesses that at present handicap these potentially valuable organizations. Part V shows how bar admission rules have been adjusted to meet the situation created by the rise of these novel and as yet antagonistic institutions. Parts VI and VII discuss at length the development of the law school curriculum and of law school methods during the vital quarter century that followed the Civil War; and the first chapter of Part VIII shows how, during the more mechanical period that ensued prior to the War with Germany, the great growth of evening or "part-time" law schools, coupled with insistence upon preliminary college training by other schools, has dealt a death-blow to the notion that all law schools can be made alike.

It will interest lawyers generally that the report does not agree with the stand taken by the Association of American Law Schools denying entrance to such Association of schools which have evening sessions. The report com-

mends the evening school in order to give access to the law to those too poor to give full time to study, but suggests that these schools be brought up to higher standards of entrance requirements and legal studies than is the case today, at least as to such graduates as expect to enter the profession of law. On this point the report says:

"Over half the existing law schools, including over half the aggregate number of law school students, offer instruction during the late afternoon or at night. This movement to make law study possible for self-supporting students of average ability is justified on political grounds. The existing grave deficiencies of these schools are largely attributable to the fact that many of the best institutions and best law teachers, influenced by the theory of a unitary bar, regard part-time education as inherently evil."

The bulletin discusses the various kinds and methods of legal instruction and the relation of the bar to the methods thus adopted and the character of the standards to be set up by Supreme Courts and Bar Examiners for entrance into the active practice.

Printed in one volume of 498 pages, bound in paper, and distributed free upon proper application by the Carnegie Foundation for the Advancement of Teaching, 522 Fifth Ave., New York.

CLARK ON EQUITY (MISSOURI EDITION).

What is probably the forerunner of a new type of law text books has appeared in the form of a one volume work on equity by Prof. George L. Clark, formerly professor of equity of the Missouri University.

To call the book elementary may be misunderstood. It is elementary only in the sense that in the main part of the work all the general principles are stated in clear, concise terms, preceded by a very valuable summary of the history and growth of equity jurisprudence.

The work is not elementary, however, when the appendix is taken into consideration, for this appendix to the "Missouri Edition" contains a full and complete annotation of Missouri cases which, by reference to sections of the text, are made part of the work itself. Thus, to the Missouri lawyer it is practically an exhaustive treatment of the problems involved, and more valuable than many larger works that do not so carefully distinguish the Missouri cases.

Prof. Clark has prepared special state editions for Ohio, Tennessee, Illinois, Massachusetts and New York and promises that other special state editions will be published as opportunity presents itself.

We have read much of the text of this book with great interest. Prof. Clark has the faculty of expressing his thoughts with peculiar felicity as well as with unusual clearness and accuracy. His treatment of the subject displays a profound knowledge of the history and principles of equity and a familiarity with the facts and decisions of the great leading cases.

We cannot imagine a better text book for the student nor a better treatise (when coupled with an appendix of all state decisions) for the practicing lawyer. To our mind all text books must ultimately take this form. The more recent text books which purport to completely treat such big subjects as equity, contracts, corporations, negligence, etc., are unwieldy in size, inaccessible and unnecessarily expensive.

It is not every text writer that has the ability to compact into short compass all the leading principles of his subject and then distinguish the application of such principles by a complete annotation of the cases of a particular state. But this is what Dr. Clark has done, and done well. We confidently look for books of this kind gradually to supplant other text books of the digest type.

Printed in one volume of 793 pages and published under the supervision of the author himself.

CORRESPONDENCE.

UNIFORM BILL OF LADING ACTS—STATE AND FEDERAL.

Editor, Central Law Journal:

Your editorial comment on the case of Michigan Central R. Co. v. Owen, on p. 95 of issue of August 12, is likely to be somewhat confusing because of your failure to state that the Uniform Bill of Lading, of which section 5 is involved, is not the Uniform Bill of Lading of the American Bar Association, but the Uniform Bill of Lading prepared, and required to be adopted by all railroads operating under its jurisdiction, by the Interstate Commerce Commission. It is an unfortunate matter that the Interstate Commerce Commission should have adopted the same title for their bill of lading that is used by the American Bar Association. But when it becomes generally known that there are two Uniform Bills of Lading in existence, and referred to in the reported decisions the harm and confusion will be minimized. Yet, it would be well to designate which of the Uniform Bills of Lading is being discussed.

Yours very truly,

JAMES M. KERR.

Pasadena, Cal.

HUMOR OF THE LAW.

She—Since our engagement is off, I shall return your diamond ring.

He—Yes, and as diamonds have dropped 20 per cent since you've had it, you might add a check for the difference.—*Boston Transcript.*

First Crook: "De last guy I stuck up didn't have nuttin'."

Second Crook: "Wotcha do, croak um?"

First Crook: "Nah! He looked like a straight guy so I takes his I. O. U. for 50 bucks."

"I bequeath to my heirs and assigns forever," said the old gentleman who was making his will, "five cases of Scotch, one barrel of—"

"Wait a minute," said the lawyer.

"Eh?"

"We might as well leave out the word 'forever.'"—*Birmingham Age-Herald.*

"Just a word," said the lawyer to his fair client.

"Yes?"

"If your husband asks for the custody of the poodle don't try to win the sympathy of the court by weeping and calling the—er—little animal your 'precious darling.'"

"Why not?"

"The judge is the father of ten children, and he's proud of it."—*Birmingham Age-Herald.*

"A youth had just been appointed to a post in the tax office of a country town. One day a farmer rushed into the office, proclaiming that he had been wrongly charged two dollars for keeping a goat.

The youth insisted that it was all correct, remarking that it was in the rules, at the same time pointing out the following clause to the irate farmer: "For all property bounding and abutting on the highway, fifty cents per foot."—*Exchange.*

In an ejectment case down in Georgia the attorney for the defendant pleaded the statute of limitations and struggled for a long time to get a witness to fix accurately the date when the adverse holding began. The Judge grew impatient and took charge of the witness himself. "Can't you remember some occasion such as the election of a president or governor, or some other important event," said the judge, "by which you can fix the date?" After a brown study, the witness' face lit up and he said: "Yes, I can, Judge. It was in January of the same year that John Butt wintered March Addington's bull."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Bankruptcy—Composition.**—Under Bankruptcy Act 1898 § 14c, providing that confirmation of a composition shall discharge the bankrupt from debts other than those to be paid by the terms of the composition and those not affected by a discharge, a subcontractor on a school building, who took no part in the composition proceedings, otherwise than to prove his claim in the usual form and to accept the composition offer, was not deprived of his rights against the contractor's surety, though there was no adjudication of bankruptcy.—*McClintic-Marshall Co. v. City of New Bedford, Mass.*, 181 N. E. 444.

2. **Contest of Claim.**—A contested claim against an estate in bankruptcy presents a "proceeding in bankruptcy," within Bankruptcy Act, § 25a, reviewable by appeal, not a "controversy in bankruptcy," reviewable on petition to revise under section 24b, which would include the disposition of the assets of the estate.—*Keith v. Kilmer*, U. S. C. C. A., 272 Fed. 643.

3. **Landlord's Lien.**—Where a purchaser of property at execution sale, which was void because made within four months of the petition in bankruptcy against the debtor, acquired after action was brought against him by the trustee in bankruptcy for the property, the lien of the bankrupt's lessor on the property sold at execution, he could assert that lien as a defense to the trustee's action.—*Lewin v. Telluride Iron Works Co.*, U. S. C. C. A., 272 Fed. 590.

4. **Unrecorded Assignment.**—Where there are no statutes making record or registration of an assignment of accounts for security for a loan requisite to validity of the assignment against either assignor or assignor's creditors, the situation is not changed by the intervention of bankruptcy.—*Petition of National Discount Co.*, U. S. C. C. A., 272 Fed. 570.

5. **Validity of Sale.**—On petition to revise an order of the District Court reopening a bankruptcy estate for the purpose of having determined whether the sale of the assets was voidable, the validity of the sale, which depended on disputed facts, cannot be considered, but that question can be determined only on appeal from a decree based on a final hearing of a bill to

set aside the sale, since a proceeding to review an order in bankruptcy is limited to matters of law arising on an undisputed and indisputable record or finding of ultimate facts.—*In re Leigh*, U. S. C. C. A., 272 Fed. 678.

6. **Voluntary.**—A provision in a corporate charter authorizing disposition of the entire property of the corporation with the consent of two-thirds in interest of the stockholders, which thereby impliedly prohibits such disposition without the consent of the stockholders, does not deprive the directors of authority to direct the filing on behalf of the corporation of a petition in voluntary bankruptcy.—*In re De Camp Glass Casket Co.*, U. S. C. C. A., 272 Fed. 560.

7. **Banks and Banking—Act of President.**—Where the president of a bank acted as an individual and not as an official of the bank in purchasing defendant's cotton and promising to deposit the proceeds in the bank to his credit, the bank was not responsible to the defendant for his failure to deposit the proceeds to defendant's credit, though he deposited them to his own credit; it not appearing that any of the other officers knew anything about the nature of the transaction until long afterwards.—*Hull v. Guaranty State Bank, Tex.*, 231 S. W. 810.

8. **Exchange Value.**—A trust company, which sold to a customer a foreign order, the payment of which was stopped by the bank commissioner when he took charge of the trust company, is liable to the purchaser of the order for the amount thereof at the rate of exchange prevailing on the day the trust company breached its contract by stopping payment on the order.—*Beecher v. Cosmopolitan Trust Co.*, Mass., 131 N. E. 838.

9. **Overloan Not Void.**—As a general rule, courts will not refuse to enforce a bank's contract for the loan of money, or disallow damages for a breach thereof, merely because the amount lent exceeds 20 per cent. of the capital and surplus, notwithstanding a statute penalizing the banker for exceeding that limit.—*Bank of College View v. Nelson*, Neb., 183 N. W. 100.

10. **Bills and Notes—Disputed Claim.**—Where there was basis for the claim of lessor of sheep at the expiration of the lease that the lessee was then obligated to return to lessor the full number of sheep received, and could not account for the admitted deficiency merely by paying \$5 per head, and the lessee threatened to have such number of sheep seized from lessee's flock, there was a bona fide dispute, the compromise of which was good consideration for lessee's check to lessor.—*Ilfield v. Porter*, Cal., 198 Pac. 429.

11. **Holder in Due Course.**—When it was shown that negotiable promissory notes were obtained by the fraud of the payee, the burden of proving that it became a holder in due course was cast on a bank to which they were indorsed by the payee without recourse.—*Farmers' State Bank v. Cooke*, Minn., 183 N. W. 137.

12. **Brokers—Commission.**—Where a contract provided that, if plaintiff should secure a purchaser, he would be entitled to all sums in excess of a certain amount, plaintiff, to recover, must show either that he consummated the contract, and by effecting a completed cash sale created a fund out of which he is to be paid, unless he was prevented from consummating the same by the acts of defendant owners.—*Anderson v. Wallowa Nat. Bank*, Ore., 198 Pac. 560.

13. **Carriers of Goods—Measure of Recovery.**—Value at time and place when delivery of interstate shipment should have been made is measure of recovery when less than value at time and place of shipment.—*Crutchfield & Woolfolk v. Hines*, Mass., 131 N. E. 340.

14. **Measure of Recovery.**—In an action against a carrier for the loss of high explosive shells manufactured by plaintiff for the British government and having no market value properly speaking, the actual value of the shells, determined by the cost of replacing them, or, if shells of similar material could be manufactured at a certain place, such price, with such expenses as might be reasonably incurred in pro-

curing a new contract, would fairly measure the extent of the loss.—*Woonsocket Machine & Press Co. v. New York, N. H. & H. R. Co., Mass.*, 131 N. E. 461.

15. **Carriers of Passengers**—Act of Passenger.—An elevated railroad company is not liable for the act of a passenger, who throws an object from a moving train, striking and injuring a person standing on the station platform for the purpose of boarding a train.—*King v. Interborough Rapid Transit Co., N. Y.*, 188 N. Y. S. 700.

16. **Negligence**—That a passenger in a street car falls over a sample case which another passenger has placed on the floor beside him does not, as a matter of law, establish the street car company's negligence; and the court's instruction that if the sample case was so placed and plaintiff fell over it, she was entitled to damages, unless she was guilty of contributory negligence, was erroneous.—*Rittle v. St. Paul City Ry. Co., Minn.*, 183 N. W. 146.

17. **Negligence**—When a street car stops where other tracks are between it and a station of the company, the rights of people having business with the car and the duty of the company towards them are the same as if all the intervening space between the depot and the car constitutes a platform, and it is negligence to allow another car to run between alighting passenger and the station.—*Terrill v. Michigan United Traction Co., Mich.*, 183 N. W. 46.

18. **Negligence**—The conductor of a passenger train was not negligent in temporarily obstructing the aisle by standing therein, bending over to speak to some one, as a woman passenger approached, walking to the rear, and lost her balance before she reached him as she halted to wait for him to let her pass.—*Steed v. Gulf, C. & S. Ry. Co., Tex.*, 231 S. W. 714.

19. **Starting Car**—A street car should not be started merely because a sufficient length of time has elapsed to permit a passenger and those in front of her to board the car safely, for, however long a stop may be, due care requires that a conductor should look to his car before signaling to start.—*Baldwin v. Kansas City Rys. Co., Mo.*, 231 S. W. 280.

20. **Commerce**—Interstate.—A finding by the Interstate Commerce Commission that a railroad is engaged in interstate commerce and subject to the jurisdiction of the commission, if supported by any evidence, is binding on the courts.—*City of New York v. United States, U. S. D. C.*, 272 Fed. 768.

21. **Contracts**—Entirety.—Where a contract to set seven panes of glass in window lights was entire it was not performed, so as to entitle the contractors to recover, where two of the panes which they had furnished and set as agreed were broken by strikers before the other panes were set.—*Greenberg v. Mager, N. Y.*, 188 N. Y. 748.

22. **Substantial Performance**—Where a contractor intentionally failed to perform the provision of a contract requiring electric wires to be concealed in the ceilings, he cannot recover as for substantial performance.—*Bonyne v. Carex Co., N. Y.*, 188 N. Y. S. 750.

23. **Corporations**—Assets.—Stock which has been authorized has no validity until actually issued or subscribed for, and is not assets, and stock not even authorized has no greater standing.—*Fitzgerald v. Guaranty Security Corporation, Mass.*, 131 N. E. 463.

24. **Excessive Salaries**—Where a corporate charter provided that a stockholder ceasing to be an officer, director, or employee should not be entitled to dividends unless he surrendered the stock and received a dividend certificate in exchange, a stockholder not complying therewith was not entitled to sue to restrain the corporation from paying excessive salaries to directors, as excessive salaries are in diminution of dividends, and only those entitled to dividends may complain.—*Prindiville v. Johnson & Higgins, N. J.*, 113 Atl. 916.

25. **Issuance of Stock**—Where corporate stock was issued pursuant to unanimous vote of all the stockholders, it was valid, although the meeting at which it was authorized was

not called for that purpose on 60 days' notice as provided by statute.—*Scranton Axle & Spring Co. v. Scranton Board of Trade, Pa.*, 113 Atl. 838.

26. **Void Deed**—The fact that a deed from a corporation to an individual to land was executed on the part of the corporation by its secretary, who was also granted in the deed, does not render the conveyance void, where the president of the corporation also joined in the execution of the deed, under section 2,66, Code of 1906, which provides, among other things, that a corporation may convey its land under the corporate seal and the signature of an officer.—*Mexican Gulf Land Co. v. Globe Trust Co., Miss.*, 88 So. 512.

27. **Descent and Distribution**—Adequate Consideration.—Consideration of \$3,000 paid by defendants, the administrator and others, to plaintiffs for their quarter interest in a decedent's estate claimed by defendants to have been worth at the time of such sale not over \$12,000, held not so grossly inadequate as to shock the conscience, despite plaintiffs' claim that the interest conveyed by them was worth \$4,000 or \$5,000.—*Forbes v. Harrison, N. C.*, 107 S. E. 447.

28. **Easements**—Estoppel.—Where plaintiff claimed a right of way over defendants' land by grant by defendants' ancestors in title to plaintiff's ancestors in title, recitals in the deed to plaintiff and the deeds from and to his ancestors in title mentioning such right of way cannot be set up by way of estoppel against defendants; they being strangers to such deeds, and not privies to any of the parties thereto.—*Jeff v. Reynolds, K. I.*, 113 Atl. 787.

29. **Electricity**—Due Care.—Plaintiff, working for a company decorating city streets, injured while climbing a pole which defendant electric company and others were using, cannot recover unless he was rightfully there and doing what he had a right to do, and the situation was such that the defendant ought to have anticipated his presence in time to have prevented such injury.—*Lambert v. Derry Electric Co., N. H.*, 113 Atl. 793.

30. **Eminent Domain**—Damages.—An action of tort will not lie to recover damages incidental to the performance of a public work authorized by the Legislature, such as the construction in the street of a tunnel authorized by St. 1911, c. 741, and the owner of the property damaged must pursue the remedy provided in section 21, providing for the determination and award of damages sustained by reason of property taken or injured under the authority of that act.—*Moraski v. T. A. Gillespie Co., Mass.*, 131 N. E. 441.

31. **Executors and Administrators**—Ancillary Administration.—While ordinarily primary administration should be granted in the state of the intestate's domicile, it cannot be said that he courts of another state, having jurisdiction, must necessarily wait for proceedings to be brought in the domiciliary state, especially where the only assets in either state are a right of action for death under the federal Employers' Liability Act.—*McCarron v. New York Cent. R. Co., Mass.*, 131 N. E. 478.

32. **Garnishment**—Equitable Proceedings.—Trustee proceedings under the statute whereby an adverse claimant to the fund attached is made a party for the purpose of determining his claim are not equitable proceedings, but are in the nature of equitable relief in an action at law, so that the only action the court can take on sustaining the claim of the intervenor is to enter judgment discharging the garnishee, and no appeal will lie from such judgment as a final equitable decree.—*Garst v. Canfield, R. I.*, 113 Atl. 865.

33. **Husband and Wife**—Void Conveyance.—In an action to recover from plaintiffs' father property formerly belonging to their grandmother, deceased, a writing introduced by defendant, executed by deceased, conveying the land to plaintiffs with a reservation to defendant of a life estate, was void and passed no interest to plaintiffs or defendant, the land conveyed belonging to a married woman, and her privy examination, not having been taken.—*Clendenin v. Clendenin, N. C.*, 107 S. E. 458.

34. **Insurance—Breach of Warranty.**—Rev. St. 1913, § 3187, providing that breach of a warranty or condition shall not avoid the policy unless such breach contributes to the loss, is applicable not merely to conditions existing at the time of application for and issuance of the policy, but to subsequent violations, and covers breaches of conditions as well as initial misrepresentations, notwithstanding the fact that the catchwords read "warranty not to avoid policy unless deceptive."—*Security State Bank of Edyville v. Aetna Ins. Co., Neb.*, 183 N. W. 921.

35. **Delay in Action.**—Where an insured failed to commence suit on a policy within the time fixed thereby, his delay was not excused by the company's conduct in agreeing to an appraisal and award of damages or other acts of the company contemplated by the terms of the contract.—*John Tatham & Co. v. Liverpool, London & Globe Ins. Co., N. C.*, 107 S. E. 450.

36. **Examination After Loss.**—Failure or refusal to submit to examination after loss does not bar recovery, but merely suspends the right of recovery until the condition of examination is complied with; and such failure or refusal is therefore to be pleaded in abatement, and not in bar, and, if the plea be sustained, its only effect is dismissal of suit as prematurely brought.—*Humphrey v. National Fire Ins. Co., Tex.*, 231 S. W. 760.

37. **False Statement.**—A positive statement of fact, falsely made in an application for insurance, and known to be false by the maker, with respect to a material matter, will, nothing else appearing, be deemed to have been made willfully and with intent to deceive.—*New York Life Ins. Co. v. Wertheimer, U. S. D. C.*, 272 Fed. 730.

38. **Forfeiture.**—Courts do not favor forfeitures and will not enforce them against equity and good conscience, so that an insurance policy will not be declared forfeited for non-payment of premiums where insurer held, when the premium became due, more than enough money due the insured as sick benefits to pay the same.—*North v. National Life & Accident Ins. Co., Mo.*, 231 S. W. 665.

39. **Loss Through Hail.**—Where an assessor has not classified land as tillable, and had made no return to the county auditor as required by law, showing the number of cultivated acres, and where the owner had not made the affidavit required by section 6 of the hail insurance act, his risk is not covered, and he is not entitled to recover indemnity upon an attempted compliance with the law in the month of July after loss has been sustained through hail.—*Bossen v. Olness, N. D.*, 182 N. W. 1013.

40. **Military Service.**—In an action on a life insurance policy where the defense was interposed that insured was killed in military service wherein he had engaged without the consent of insurer, held, that the provisions of the policy did not ipso facto work a forfeiture thereof by the death of insured while engaged in such service.—*Hagelin v. Commonwealth Life Ins. Co., Neb.*, 183 N. W. 103.

41. **Intoxicating Liquors—Possession of Equipment.**—If defendant moved on premises where there was paraphernalia for the manufacture of intoxicating liquor, and took possession of such paraphernalia and proceeded to use it, he was guilty of having in possession equipment to manufacture intoxicating liquor not for medicinal, etc., purposes, though the equipment was already in existence on the premises when he took charge of them.—*Thielepape v. State, Tex.*, 231 S. W. 769.

42. **Use of Automobile.**—An automobile engaged in the transportation of intoxicating liquors was properly condemned, although the owner thereof was not a party to the transportation, or had notice of the same, where he had been warned of a report that the person driving it had been so using his car and was negligent in not getting rid of such person, and not acting upon the warning and following it up by an investigation.—*Davenport v. State, Ala.*, 88 So. 557.

43. **Use of Automobile.**—Automobile purchased by a father and lent or turned over to

his son for use as a public taxicab, to be paid out of the proceeds of the taxicab business, a license being issued to the son to run it in his name as owner, which the father knew, held subject to condemnation and forfeiture under Gen. Acts 1919, p. 13, § 13, where used by the son for the unlawful transportation of whisky.—*Fearn v. State, Ala.*, 88 So. 591.

44. **Landlord and Tenant—Assignment of Lease.**—An assignment of an interest in a lease by one of two lessees to the other is a breach of a covenant against assignment, though the lessees were partners and, if not waived, is a defense to an action upon a covenant of renewal.—*Saxeney v. Panis, Mass.*, 131 N. E. 331.

45. **Forcible Entry.**—Landlords who entered premises in possession of delinquent tenant by removing lock from the door, and who removed the tenant's property therefrom and substituted own property in place thereof, and who thereafter remained in possession and excluded tenant therefrom, held guilty of forcible entry under Code Civ. Proc. § 1159, making every person who breaks open doors and windows or other parts of a house guilty of forcible entry.—*California Products, Inc., v. Mitchell, Cal.*, 198 Pac. 646.

46. **Lease.**—A lease providing that the last three years the rent should be raised and the amount fixed by the lessors was not void for uncertainty; as it provided means for the fixing of the rent; the word "reasonable" could be implied in the clause relative to rent.—*Bird v. Couchols, Mich.*, 183 N. W. 36.

47. **Title to Land.**—A tenant of one in possession of land, claiming title thereto, the title to which is in the United States government, may dispute his landlord's title by showing that fact; the ordinary rule which forbids a tenant disputing his landlord's title having no application in such case, because violative of public policy.—*Ellis v. Sutton, Miss.*, 88 So. 159.

48. **Licenses—Transient Merchant.**—A butcher who had an established place of business in a city in the same county and who, at stated times each week, sent a truck load of meat into the town for sale to customers from the truck, is not a "transient merchant" in the town within Rev. Code 1919, § 10120, which defines such merchants by excluding therefrom permanent merchants who pay taxes upon their articles of trade in the county where the business is carried on the same as other resident dealers.—*Town of Valley Springs v. Platt, S. D.*, 183 N. W. 131.

49. **Master and Servant—Burden of Proof.**—In an action for the death of a sub-contractor's employee, working on the ground when he was struck by a falling brick in a building in the course of construction, where the proofs as to the place from which the brick came fixed it between the third and ninth floors on which latter floor the sub-contractor's bricklayer was seen at work, and it appeared that men working for others were in the building, with bricks scattered over the various floors and on the window sills, plaintiff failed to meet the burden of proving that the sub-contractor, through his employees, caused the injury.—*Fleccia v. Atkins, Pa.*, 113 Atl. 842.

50. **Contributory Negligence.**—Where plaintiff, a carpenter, constructed a runway for wheelbarrow men which was some two inches lower than the door through the foundation wall, but the same was accepted, and at a time considerably later, in order to avoid it, a wheelbarrow man stepped on a loose board which had been placed to lessen the jar and was thrown to the ground and injured, the question of his contributory negligence under the circumstances held for the jury.—*Forrester v. Walsh Fire Clay Products Co., Mo.*, 231 S. W.

51. **Course of Employment.**—A traveling salesman whose duties required him not only to be attentive in seeking orders for his employer but in being courteous, oblique, and performing services not strictly relating to the sale of commodities intrusted to him, but which aided in the sale because of the accommodation and consideration, was entitled to compensation under Workmen's Compensation Act, § 315, where he was injured while driving to his home

to wait for a telephone call from a customer who had become separated from his party at a fair and desired to be taken home by the salesman in his car if he could not find his own party.—*Chase v. Emery Mfg. Co., Pa.*, 113 Atl. 840.

52.—**Negligence.**—Where a railroad employee was engaged in removing lamps from rear of passenger train in depot and filling them for future use, it was negligence as to him to move the train backward without notice of some kind to such employee, in view of federal Employers' Liability Act.—*Grijnuk v. McAdoo, N. J.*, 113 Atl. 920.

53.—**Mortgages—Maturing Debt.**—Where a mortgage provided for maturing of debt on mortgagor's default in payment of principal, interest or taxes, upon the mortgagor's failure to pay the taxes within the time required by the mortgage, the mortgagee had the right to treat the whole mortgage debt as due or to waive the default; and such right does not depend on the motive prompting his election, and hence the exercise of the right by electing to foreclose cannot be objected to on the ground that it is oppressive or inequitable.—*Lotterer v. Leon, Md.*, 113 Atl. 887.

54.—**Navigable Waters—"Accretions."**—The accretions contemplated by Code Pub. Gen. Laws, art. 54, §§ 47-49, to which the riparian owners are entitled by the statute, are not confined to those which, in their formation, start at the shore and extend outward to the channel, but also embrace those which start in the channel and lie between the shore and the channel.—*Melvin v. Schlessinger, Md.*, 113 Atl. 875.

55.—**Nuisance—Hospital.**—It cannot be assumed in advance of its establishment that a hospital for contagious diseases well equipped and managed under the supervision of public health boards will be a nuisance.—*Cook v. City of Fall River, Mass.*, 131 N. E. 346.

56.—**Only Accrued Damages Are Recoverable.**—In an action for damages for the maintenance of a private nuisance, plaintiff can recover only the damages which had accrued prior to the trial of the action, and cannot recover permanent damages, and it was not error for the court to refuse to submit the issue of permanent damages tendered by defendant and objected to by plaintiff.—*Morrow v. Florence Mills, N. C.*, 107 S. E. 445.

57.—**Principal and Agent—Authority of Agent.**—A general agent left in charge of retail drug business did not have authority to bind his principal under a contract wherein he purchased a piano and printed matter to be used in a voting contest, seller guaranteeing a certain increase of the drug business as a result of the voting contest.—*Loveland v. Kitterman, S. D.*, 183 N. W. 128.

58.—**Railroads—Spur Track.**—Under the Public Utilities Act, it was intended that both a railroad company and a public grain elevator connected by a spur track with the railroad's main track should be subject to the control of the Public Utilities Commission, such a spur track being an instrument of commerce devoted to public use and subject to regulation.—*Public Utilities Commission v. Smith, Ill.*, 131 N. E. 371.

59.—**Sales—Breach of Contract.**—In an action by the buyer of cider for fraud in the inception of the contract, the entire conversations which led up to the contract, necessarily involving any conversations about the collateral contracts of resale, were provable, and plaintiff, under his claim of damages through loss of profits, would be permitted to prove he could not procure cider in the open market.—*Foster v. De Paolo, N. Y.*, 188 N. Y. S. 746.

60.—**Delivery.**—Where contract for sale of burlap specified, "Delivery—After completion your order" of a specified prior date, the word "completion" was not used in the sense that the prior order or contract could not be deemed "completed" until the goods delivered thereunder were paid for; hence the seller breached his contract by refusing to make delivery until after the former invoice was paid.—*Fulton Bag & Cotton Mills v. Frankel, N. Y.*, 188 N. Y. S. 709.

61.—**Statutes—Conformity of Title.**—Act March 13, 1919, described in title as an act to amend Civ. Code 1912, § 2937, as amended, a special act relating to the tax levy applicable only to the cities of Anderson and Spartanburg, and purporting in its body to remove all limitations upon the authority of cities of more than a specified population to impose annual taxes for municipal purposes, held violative of Const. art. 3, § 17, in that the title does not conform to the body of the act.—*Robinson v. City of Columbia, S. C.*, 107 S. E. 476.

62.—**Discriminatory.**—The obligation imposed upon municipalities having waterworks constructed prior to 1912 to furnish free service to charitable institutions operates as a discrimination against them and in favor of municipalities constructing waterworks after 1912, and therefore section 3963, General Code, and section 14769, General Code, in so far as they require free service to charitable institutions, are in conflict with section 26, article II, of the Constitution of Ohio, requiring laws of a general nature to have uniform operation throughout the state, and therefore inoperative.—*Village of Euclid v. Camp Wise Ass'n, Ohio*, 131 N. E. 349.

63.—**Taxation—Property in Transit.**—Products of the state intended for exportation to another state do not cease to be a part of the general mass of property in the state subject to taxation until shipped or entered with a common carrier for transportation to another state, or until they have been started upon such transportation in a continuous route or journey, or until they have entered upon their final journey out of the state.—*Champlain Realty Co. v. Town of Brattleboro, Vt.*, 113 Atl. 806.

64.—**Telegraphs and Telephones—Liability for Error.**—Telegraph company was not liable to addressee for error in transmission of unrepeatable interstate message where the contract under which the telegram was received and transmitted limited liability in such case to cost of sending message, and where the claim for damages was not presented within 60 days after the telegram was filed with the company for transmission. In view of Act Cong. June 18, 1910, providing for regulation of interstate commerce by telegraph by Congress.—*Western Union Telegraph Co. v. Chas. C. Brent & Bro., Ky.*, 230 S. W. 921.

65.—**Tenancy in Common—Fiduciary Relationship.**—There is no such a relationship of trust and confidence between tenants in common that transactions between them, whereby one acquires the interest of the other, are, by reason of the relationship itself, presumed to be fraudulent, casting the burden on the tenant, acquiring the interest of the other of showing that he practiced no fraud or other inequitable means.—*Klein v. Waltman, N. Y.*, 188 N. Y. S. 331.

66.—**Weapons—Right to Bear Arms.**—Pub. Loc. Laws 1919, c. 317, so far as it prohibits the carrying of a pistol unconcealed off of one's own premises without a permit, for which a fee of \$5 and a bond in the sum of \$500 is required, is invalid under Const. art. 1, § 24.—*State v. Kerner, N. C.*, 107 S. E. 222.

67.—**Wills—Execution.**—In action to set aside a will and revoke order probating it the averment that decedent executed the alleged prior will under which plaintiff claims amounted to an allegation that all acts were done which are required to constitute execution under Burns' Ann. St. 1914, § 3132, including the signing by testator at a time when he possessed testamentary capacity, and the attestation in his presence by two competent witnesses.—*Emhardt v. Collett, Ind.*, 131 N. E. 48.

68.—**Witnesses—Inspection of Corporate Books.**—A corporation cannot, on the theory that its officers or agents might be incriminated by a disclosure of the corporate records prevent inspection of corporate books, for the immunity against self-incrimination is a personal one, which covers the officers and agents alone, and the corporation which has no such immunity cannot invoke it on behalf of its officers and agents.—*Nekoosa-Edwards Paper Co. v. News Pub. Co., Wis.*, 182 N. W. 919.

Central Law Journal.

St. Louis, Mo., September 30, 1921.

UNIFORM PROCEDURE THROUGH A FEDERAL PRACTICE ACT.

The American Bar Association at Cincinnati again endorsed by practically a unanimous vote the bill which has been pending in the Senate of the United States for several years to give the Supreme Court power to make rules of procedure for the law side of the federal courts. This bill passed the House on one occasion but died in the Senate Committee which has consistently refused to make a report on it. It is said that Senator Walsh of Montana is the chief antagonist.

Mr. Thomas W. Shelton, of Norfolk, Va., chairman of the American Bar Association Committee on Uniform Procedure, reported to the Association at Cincinnati the obstacles which a few members of the Senate Committee had thrown in the way of the bill which was now one of the chief objectives of reform legislation before the lawyers of the country.

Mr. Shelton declared that everywhere bar associations were simply marking time waiting for Congress to act on this important measure. Many Credit Men's Associations, Chambers of Commerce, and other lay organizations had petitioned for the passage of the bill and he declared that the country was fast losing its patience over the holding up of a measure like this by a few men who probably do not appreciate the importance and justice of it nor the demand that exists for it. "These men who are opposing this bill," said Mr. Shelton, "do not understand how important it has become to business men to have procedure as well as certain codes of commercial law uniform. There are today 96 different systems of court procedure in the United States, for each state has both its

Federal and state practice. This is as useless and unnecessary as so many different languages. Business men ought not to be required to pay this heavy and unnecessary toll of counsel fees and costs every time they cross a state line or go into the Federal Courts."

In concluding his report to the Association, Mr. Shelton urged every lawyer to write some member of the Senate Judiciary Committee and make the request that the bill be reported favorably to the Senate at once. The Central Law Journal joins in that request. We do not believe that there is today before the lawyers of this country a more important issue.

The elevation of Mr. Taft to the Chief Justiceship of the Supreme Court has added fuel to the enthusiasm of the lawyers of this country for this measure. The delegates at Cincinnati were unanimous for this bill. Some lawyers who had given only lukewarm support are now enthusiastically working for it on the ground that a code of laws prepared under the supervision of one like Justice Taft who has such enlightened and liberal views on procedure is bound to be a success. Chief Justice Taft declared before the Judicial Section meeting at Cincinnati, which was attended by many appellate judges, that he was in favor of the proposed bill and was ready to do his part in preparing a code of procedure for the Federal Courts which would represent the best experience of England and America. After his address the Judicial Section again endorsed the bill and Federal Judge Charles A. Woods, of Marion, S. C., President of the Section, made this statement:

"The chief argument in favor of the bill is this: If the Supreme Court of the United States under the authority of Congress, could formulate rules of procedure and practice in the Federal courts, applicable alike to courts of law and equity, it would set up a standard of simplicity which would probably be followed by all states of the union."

A golden opportunity is presenting itself to the bar at this time to secure from Congress the adoption of a practice act regulating Federal procedure at law and from the Supreme Court the promulgation of elastic rules of procedure, which would, without doubt, in view of the earnest co-operation of the Court and of the lawyers which is promised by the favorable attitude to this reform taken by the Chief Justice and the leaders of the bar, result in the greatest code of procedure ever promulgated and would at once become the model for every state which desired to conform its procedure, in the interests of uniformity and simplicity to that of the Federal courts.

NOTES OF IMPORTANT DECISIONS

RIGHT OF AUCTIONEER TO CHANGE TERMS OF SALE ANNOUNCED IN A CATALOGUE.—The New York Supreme Court (App. Div.) has announced a rule of law that requires some comment. In the case of *Burling v. Dale*, 65 N. Y. L. J. 1329 (July 22, 1921), that Court reverses a judgment for defendant in a suit by an auctioneer for failure of the former to carry out his contract, and holds that "auctioneers have the right, before any particular lot of goods is offered, to change the terms of sale, so long as this is done publicly in the hearing of all the bidders present, and it is immaterial that the successful bidder may not have heard the changed terms announced before the goods were offered for sale."

In this case the catalogue announced that all goods sold at the auction would be ready for delivery January 7th, 1921. Defendant was not present when the auctioneer put up the special lot of woolen goods on which he was the successful bidder. He came in after the bidding had started and did not hear the auctioneer state that as to that particular lot delivery could not be made until Jan. 21, 1921. Refusing to take the goods unless delivered by Jan. 7th, plaintiffs resold the goods for an amount less than defendant's bid and sued the defendant for the difference. In overruling a judgment for defendant, the Court said:

"Even if these goods had been in the catalogues, and so had been advertised for sale under the printed terms, still we think that

plaintiffs had the right, before any particular lot was offered, to change those terms, so long as it was done publicly in the hearing of all the bidders present. The rule is well stated in *Williston on Contracts* (Vol. 1, § 30): 'Since it has been held that no contract for the sale of goods is complete until the hammer falls, it necessarily follows that, even though an auction sale has been advertised to be without reserve, or has been advertised to be held under other specific conditions, the auctioneer may without liability change those conditions at any time before the fall of the hammer, unless some preliminary contract can be found binding the auctioneer from the outset of the sale to observe the advertised conditions of the sale.'

"And this text is supported by these cases among others: *Kennell v. Boyer*, 144 Ia. 303, 305; *Ashcom v. Smith*, 2 Pen. & W., Pa., 211, 218; *Satterfield v. Smith*, 33 N. Car. 60; *Wainright v. Read*, 1 Desaussure, S. C. 573-582, and other cases cited in 24 L. R. A., N. S., note, p. 488. And although the buyer may have seen the advertised terms and may not have heard the changed terms announced before the goods were offered for sale, still, under the cases cited, this is immaterial."

The question in this case hinges upon the inquiry—is it the duty of the auctioneer to bring home to the bidders the change in the printed terms of sale, or is it the duty of the bidder to inquire whether the terms have been changed?

We believe that if the goods are listed in the catalogue and the terms there clearly stated and nothing appears therein to put the bidder on inquiry of a possible change in the terms of sale as to any particular article, that, in such a case, the duty should be upon the auctioneer to make known to the bidder at his peril, the change in the terms of sale. Unless this is done the acceptance of the bidder is to a different offer than that made by the auctioneer and there is therefore clearly no meeting of the minds.

It seems to us ridiculous to require bidders to inquire if there has been any change in the terms printed in the catalogue, unless the terms therein quoted are distinctly stated to be subject to change. When an auctioneer sees fit to change the advertised terms of sale, the burden should be upon him to bring home the change to every bidder present. Unless this is done there is a clear lack of mutual assent and no sale resulted.

FORFEITURE OF AUTOMOBILE FOR ILLEGAL TRANSPORTATION OF LIQUOR.—That a Ford automobile should be held to be a nuisance is not so surprising as that it should be confiscated for carrying intoxicating liquor against the protests of an innocent mortgagee.

This was the decision in the recent case of *State v. Stephens*, Kans., 198 Pac. 1087.

In this case the automobile was charged with the illegal transportation of intoxicating liquors from Joplin to Tulsa; through the State of Kansas. The interesting fact in this case was that there was an inter-pleader by one Rothchild, claiming that he held a duly recorded chattel mortgage on the automobile, and that he had neither knowledge nor notice that the automobile was being used for the unlawful transportation of liquor.

The prosecution was under the State law of Kansas, which provides absolutely that any automobile used for the transportation of intoxicating liquor is a common nuisance and as such shall be forfeited and sold and the proceeds go to the county school fund.

The appellant (inter-pleader) contended that the interest of an innocent chattel mortgagee in such cases should be protected, and there are decisions to that effect. But the Court declared that under the Kansas Statute the forfeiting of the interest of a chattel mortgage holder in property unlawfully used is merely one of the more or less regrettable, but nevertheless necessary results incidental to the proper execution of the judgment.

The reason for absolute forfeiture in such cases is, as the Kansas Court points out, that if it were otherwise, collusion between the owners and a mortgagee would defeat the purpose of the law, since any person desiring to engage in the illegal transportation of intoxicating liquors could, by placing an incumbrance upon an automobile, minimize the financial investment and hazard of the business.

The appellant's contention that if the law was so construed as to forfeit the interest of an innocent person in the automobile, then the law to such extent was unconstitutional, was dismissed on the authority of the United States Supreme Court in the case of *Grant v. United States*, (41 Sup. Ct. 189), where that Court held that the Act of Congress forfeiting any conveyance employed in the illegal transportation of liquor was directed against the thing itself and not against the person. The Court said:

"It is the illegal use that is the material consideration; it is that which works the forfeiture, the guilt or innocence of its owner being accidental. If we should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a 'thing' that can be used in the removal of goods and commodities and the law is explicit in its condemnation of such things."

INVESTMENT, SPECULATION AND GAMBLING ON THE FLUCTUATIONS OF THE MARKET PRICES OF CORPORATE STOCKS AND OTHER COMMODITIES.

Investment, speculation, gambling on the fluctuations of the market prices of corporate stocks and commodities, taxation and the rights of minority stockholders are all subjects of importance upon which the advice of lawyers is very frequently asked. A fairly complete bibliography on this subject is given in the note.¹

A "corner" has been defined to be "whereby somebody succeeds in buying for future delivery more property of a given kind than is possible for the seller to deliver before the day of the maturity of the contract." It is a gambling contract under Section 130 of the Illinois Criminal Code, and the Illinois Supreme Court has said that "corners" engulf hundreds in utter ruin, derange and unsettle prices, and oper-

(1) The late work of "Jordan on Investments," by David F. Jordan, Lecturer on Finance, New York University, is advertised as the only book to cover the entire field of investment, and includes a discussion of the effect of taxes on various classes of securities. "Speculation on the Stock and Produce Exchanges of the United States," by Prof. Henry Crosby Emery, of Columbia University, covers the subjects of "Stock and Produce Exchanges," "Their Business Methods," "The Economic Function of Speculation," "Some of the Evils of Speculation" and "Speculation and the Law." "Dewey on Contracts for Future Delivery and Commercial Wagers" (1886), including "Options," "Futures," and "Short Sales," by T. Henry Dewey, of the New York bar, was the first to be published in which the subject was reduced to rules. He also published in 1905 "Legislation Against Speculation and Gambling in the Forms of Trade," including "Options," "Futures" and "Short Sales." "Speculation and Gambling in Options, Futures and Stocks," (June, 1921) by James C. McMath, of Chicago, covers the legislation and decisions of Illinois with references to annotations, case notes and legal periodicals. In this work the subject is treated from the standpoint of history, economics, the law and procedure. The "United States Cotton Futures Act," of August 11, 1916, is in Barnes Federal Code, 1919, Secs. 5480, et. seq. "The Futures Trading Act," recently passed by Congress, becomes effective December 24, 1921 and, it is said, will not affect trading on the Exchanges otherwise than remove operations in privileges ("Puts and Calls") which, as some operators see it, will benefit the market more than it will hurt it. It is said that trading in "Puts and Calls" will cease on the Chicago Board of Trade October 1, 1921. The Lantz bills (S. B. 283 and 284) to define license and regulate public exchanges, and to regulate sales of grain for future delivery recently be-

ate injuriously on the fair and legitimate trader in grain, as well as the purchaser, and are pernicious and highly demoralizing to the trade." The Leiter wheat deal in 1897-98 was an illustration of what can happen when the bottom falls out of a "corner." It was said that he was carrying sixteen million bushels of wheat when he acknowledged defeat.

Speculation has always existed wherever buying and selling has existed—ever since the days when Joseph cornered the grain supply of Egypt, as reported in the book of Genesis. In December, 1914, Samuel Untermyer, of New York, delivered an

address before the American Economic Association of Princeton, N. J., and the opening paragraph of this address was as follows: "It is fortunate for the country that we are at last to have a dispassionate consideration of this vastly important subject in a forum where economic problems are fearlessly, dispassionately and impartially discussed and analyzed on their merits. There has been so much of honest misunderstanding, senseless hysteria and ignorant, demagogic denunciation of the Stock Exchange on the one hand and on the other such a long, unbroken record of intemperate and misleading propaganda by the in-

fore the General Assembly of Illinois, were not enacted. Newcomb's "Inheritance Tax Charts," giving accurate and concise information of the laws of all the States of the United States and the Federal Government, with a list of corporations, is a recent publication. "Rights of Minority Stockholders," by Richard Selden Harvey, of the New York bar (1909) covers "The Abuses of Control," "Means of Redress," "Watered Stock," "Powers of Stockholders," "Duties of Directors" and "Stockholders Differences." "The Money Trust Investigation," by the Pujo Committee in 1912-13 is in four volumes, published by the Government Printing Office and covers, among other things, an investigation of the New York Stock Exchange. "Regulation of the New York Stock Exchange" (Hearings before the Committee on Banking and Currency, U. S. Senate, 63rd Congress on S. 3895), a bill to prevent the use of the mails and of the telegraph and telephone in furtherance of fraudulent and harmful transactions on stock exchanges, is a book of 943 pages, published by the Government Printing Office. "Future Trading" (Hearings before the Committee on Agriculture, House of Representatives, 67th Congress, First Session, April, 1921, series C), by the Government Printing Office, contains 357 pages, and the hearing resulted in the enactment of "The Futures Trading Act," which will soon be available. "The Stock Exchange from Within," by William C. Van Antwerp (1914) contains in the appendix the report of the Committee appointed by Gov. Charles E. Hughes of New York, to endeavor to ascertain "what changes, if any, are advisable in the laws of the State bearing upon speculation in securities and commodities, or relating to the protection of investors, or with regard to the instrumentalities and organizations used in dealing in securities and commodities which are the subject of speculation." "The Octopus and Lesser Evils," by John Hill, Jr., May 23, 1921, a pamphlet on the Capper-Tincher bills (grain futures) treats of the four great evils of the grain trade of Chicago, to which the abuses, at times so bitterly attacked, can be traced, and states the abuses in the order of their importance as follows: "Public Warehouse or Grain Trust," "Puts and Calls," "Bucket Shops," "Private Wires in Small Towns," "The Futures Trading Act" (H. R. 5676, known as the Tincher bill), an open letter of June 17, 1921, by John Hill, Jr., to Hon. E. F. Ladd, U. S. Senate, Washington, D. C., suggested changes in the legislation. Gambling, 20 C.Y.C. 873 et. seq., Gambling Contracts, 14 A. & E. Enc. of Law, second Ed., 570, et. seq. "Gambling in Illinois," by George D. Smith, Illinois Law Review, May, 1921. "Conflict of Laws as to Gambling Contracts," 16 LRA (N. S.) 650, note. Contracts for sale of personal property to be delivered in the future, 1 Am. St. Rep. 752-766. The Law of Gambling Contracts is the subject of a leading article in 47 Cent. Law Journal, 189; also another leading article relating to Cotton Futures, Vol. 36, 509 (See also

Index Digest "Gaming"). "Goldbricks of Speculation" by John Hill, Jr., of the Chicago Board of Trade (1904) was dedicated to the legitimate brokers of the great Exchanges, their Patrons and the Trading Public, in the hope that it would divorce forever in the public mind legitimate speculation from gambling and swindling. It is a study of speculation and its counterfeits and an expose of the methods of bucket shop and "Get-Rich-Quick" swindles. Blue Sky Laws are in force in 38 states. In Reed & Washburn's Blue Sky Laws, the law of each of the various states is analyzed and summarized with respect to the general character of the law, the persons affected, and licensing and supervision and the criminal and civil penalties. The May, 1910 number (264 pages) of The Annals of the American Academy of Political and Social Science (Philadelphia) is devoted wholly to stocks and the stock market and contains a thorough treatment of the subject, also "A Bibliography on Securities and Stock Exchanges," by Prof. S. S. Huebner of the University of Pennsylvania. The September, 1911 number of the same publication (364 pages) is devoted wholly to "American Produce Exchange Markets" and is also a thorough treatment of that subject. Its contents are as follows: "The Functions of Produce Exchanges;" "Methods of Marketing the Grain Crop;" "Classification of Grain into Grades;" "Grain Inspection in Illinois;" "The Crop Reporting System;" "Current Sources of Information in Produce Markets;" "Governmental Regulation of Speculation;" "Factors affecting Commodity Prices;" "Board of Trade of the City of Chicago;" "New York Produce Exchange;" "Merchants Exchange of St. Louis;" "The Exchanges of Minneapolis Duluth, Kansas City, Omaha, Buffalo, Philadelphia, Milwaukee and Toledo;" "Cotton Exchanges and Their Economic Functions;" "Financing of Cotton;" "The Coffee Market;" "Communication—shipping facilities between the United States and South America." Especial attention is directed to the article of Prof. Carl Parker of Columbia University on "Governmental Regulation of Speculation." "Some Thoughts on Speculation" is the title of a Monograph by Frank Favant, of New York, April 1, 1909 (52 pages, very small type) and its contents are (1) "The Function of Speculation;" (2) "The Function of the Stock Markets;" (3) "Legislation Against Speculation;" (A) "English Legislation;" (B) "German Legislation;" (C) "American Legislation;" (D) "The Argument against State Legislation;" (4) "Laws relating to Speculation;" (5) "Bibliography." "Speculation on the New York Stock Exchanges (1913)—studies in History, Economics and Public Law," by Alkernon Ashburner Osborne, Instructor in Economics and Industry, University of Pennsylvania, edited by the Faculty of Political Science of Columbia University (172 pages). "The Perilous Game of Cornering a Crop," by Isaac F. Marcorson, The Munsey, August 1909, with portraits of Patten, Harper and James R. Keene.

interested champions of the Exchange to justify the abuses of the system and its irresponsible form of organization and such persistent misrepresentation of its critics that it is a positive relief to find one's self in an atmosphere where the subject will receive the judicial treatment that its commanding public importance demands."

The two questions discussed by Mr. Untermeyer in that address were: (1) Should the Stock Exchange be subjected to regulation? (2) Should such regulation include the suppression or restriction of speculation? In this address Mr. Untermeyer further said: "I have read with interest the articles, addresses and testimony of Prof. Emery on this subject and would be at many points in accord with his views as to the value of speculation, if it could be disassociated from manipulation; but I am unable to agree to his argument that there should be no limit even upon honest speculation." Mr. Untermeyer was Consul for the Pujo Committee and Professor Emery is recognized authority on Economics. The writings of these men and the very able presentation of the subject of Governmental Regulation of Speculation by Professor Carl Parker of Columbia University in the September, 1911 number of the annals of the American Academy of Political and Social Science contain about all that can be said on the great economic question of how far, if at all, speculation should be controlled by law.

In political economy there are two conflicting tendencies—one, that of *laissez-faire* accepted in the main by Adam Smith and by John Stuart Mill, and forming part of the political system of English Liberals and of doctrinaire democrats in this country. Business should be left free, so it is argued, to adjust itself. For the Government to interfere in the making of contracts creates a greater evil than the evil it is intended to cure. The other is the conflicting school which starts from an ethical or or police basis. Certain business contracts, it says, are immoral and must be prohibited.

The same subject was, many years ago, made the subject of an extensive note by Dr. Francis Wharton.²

That it is within the power of the State to prohibit speculation on the Exchanges in commodities and corporate stocks on margins would seem to be settled by the case of *Otis v. Parker*.³ A law may infringe in a degree upon the property rights of citizens, but private right must be deemed secondary to the public good. It has been said that the laws relating to this subject are unfair and not in accord with economic teachings. While this may be true, yet the laws do exist and they should be respected and enforced. What additional legislation there should be by Congress and the States to prohibit or regulate speculation on the Exchanges and to prohibit and punish gambling both on the Exchanges and in brokers' offices is for the law makers to determine, but it is clearly the duty of the judiciary, the bar and the public officials to enforce the laws that are now in force. The economic question of Governmental regulation of the Exchanges must be settled by the law makers after full consideration of the existing evils and in the interest of the producers and consumers; the legislative power is in the States, and Congress can legislate only in pursuance of the powers given by the Constitution excepting, of course, in the District of Columbia where the police power may be dealt with by Congress.

A "future" is a contract of sale where the stock or commodity is sold to be delivered at some time in the future. An "option" is a privilege and in the grain trade "options" are known as "puts and calls," "indemnities," "ups and downs," "bids and offers," and by whatever name they are called they simply give to the purchaser of the privilege the right to exercise it or not, as he may elect, e. g., privileges are not dealt in during market hours but have heretofore been dealt in for an hour after the close

(2) 11 Fed. Rep., 201.

(3) 187 U. S. 606.

of the market each day. They are the most pernicious form of gambling and in 1917 a wealthy Chicagoan is said to have lost a great many millions of dollars dealing in "options." They can be dealt in from the office boy to the millionaire. "Bucket shops" are places where grain or stocks are not bought or sold, but where the parties merely bet on the figures on the blackboard which show the fluctuations of the market prices. In effect, so far as the public is concerned, there is no practical difference between a bucket shop and a broker's office where men go through the form of buying and selling stocks or commodities without any intention of accepting or delivering the stocks or commodities, but with the intention of settling on "differences" between the market price at a given time and the price at which they ostensibly bought or sold the stock or grain. No one ever saw the sign of "Bucket Shop" on the door or window of a broker's office, but many times these places have been bucket shops in effect, if not in name.

In drawing the line between investment and speculation it should be kept in mind that investment pre-supposes an income and that speculation pre-supposes a profit. An income is certain, or relatively certain and speculation is uncertain. In drawing the line between speculation and gambling in farm products when parties are going through the forms of purchase and sale of "futures," it is the *intent* that governs. The Courts say it is the intent of the parties—but what parties? The customer and the broker, or the customer and the man with whom the broker deals on the Board of Trade? The Illinois Supreme Court has held, in *Jamieson v. Wallace*,⁴ that under the Illinois Criminal Code, Sec. 130, the intent of the customer and the broker alone is material and it makes no difference if the broker actually purchases the stocks. In *Walker v. Johnson*,⁵ Judge Gary said "that the Appellants intended no gambling

with the parties with whom they contracted but, on the contrary, intended to take and pay for what they bought, and deliver what they sold, cuts no figure, if they knew that the Appellee intended gambling or, but for their own obstinacy, would have so known. And in *Lamson v. West*,⁶ it was held that the question whether a transaction between a broker on a grain Exchange and his customer is a gambling transaction in no wise depends upon the relation between the broker and the public with whom he deals in carrying out his customer's orders. It has been so held in many other Illinois cases.

Disguised gambling in grain futures must necessarily, in most cases, be proven by circumstantial evidence. The intention of the parties in this regard may be established, not merely by their assertions, but by all the attending circumstances of the transaction and some Courts have gone so far as to hold that, in seeking to ascertain the intentions of parties to alleged grain transactions, it would not do to place any great stress on their own declarations, whether under oath, or not. The intention need not be proven by express declarations or statements of the parties, but may be established by the attending circumstances of the transaction.⁷ Dealing in "futures" or "options," to be settled according to the fluctuations of the market, is void by the common law, for, among other reasons, it is contrary to public policy.⁸

The great evil of speculation is "manipulation." The market is ruled by the amount of money that is brought to bear upon it. If no one was injured but the speculators, the public might not be so much interested in the subject, but when producers and consumers suffer by the evil practices, and when hundreds of thousands of citizens—the outside public—not connected in any way with the speculation or gambling are made to suffer the consequences of it,

(4) 167 Ills., 388.

(5) 59 Ills. App., 448.

(6) 201 Ills. App., 251.

(7) 215 Ills., 348.

(8) 125 Ills., 501.

can it be said that speculation should not be regulated by law, or that gambling should not be prohibited by law.

The enforcement of the law against wagering and gambling on the fluctuations of the market has not been and is not efficient, for several reasons, the principal one of which is because of the difficulty in securing evidence to prove the violation of the law. Undisguised gambling can easily be proven, but disguised gambling is more difficult of proof. Another reason is that lawyers and Courts are not, as a rule, familiar with the business carried on by the brokers and the Exchanges and with the transactions that are legitimate and those that are not legitimate. A still further reason is, as stated by an eminent law writer, that the cases are, a great many times, not properly prepared and presented to the Courts. Courts decide questions raised by the issues formed by the pleading and not questions that are not involved in the issues presented. Statutes enabling losers in gambling transactions to recover back their money generally limit the time within which such actions can be commenced to six months and there is also a limit placed on the time within which actions may be commenced by others to recover treble the amount lost. These actions are for a penalty that cannot be enforced in any other State.

Thousands of gambling transactions are apparently carried on by customers giving their orders in one State to be executed in another. The question then arising is, by the laws of what State are the transactions to be governed? In other words, if a man gives an order through his broker in Iowa, to be executed in Illinois and it is, in fact, a gambling transaction, is the gambling done in Iowa, or in Illinois?⁹ No small part of the gambling that is supposed to be done in Illinois is in fact, done in other States and the remedy, if any, must be

sought in those States. To make the enforcement of the law more effective, additional legislation is needed.

Tons of literature have been written and distributed by political economists, brokers and others on the subject of speculation on the stock and grain Exchanges, but little has been written on the subject of stock and grain gambling, except by the Courts. It is not the policy of Illinois to allow gambling, but it would seem that the small gambler is punished and the respectable gambler is not. In the language of the late James Harold Romain, "Why this discrimination?" His book, in defense of gambling—the only book in defense of gambling I know of, is a masterpiece by a scholar. The Board of Trade of Chicago and the Exchanges throughout the country are not, as some people suppose, to be condemned. They are a public necessity and through them great good is accomplished. The evil practices are not so much on the Exchanges themselves as they are in some of the offices of the members of these Exchanges. The Exchange is merely a meeting place and the majority of its members are high grade, business men. The problems to be solved by legislation—Federal and State—are very largely those set forth in the report of the Hughes Committee hereinbefore referred to.

The Capper-Tincher bill, according to a synopsis made by the Chicago Tribune seeks to:

Abolish transactions known as "indemnities" or "puts and calls" by levying a prohibitive tax.

Admit co-operative associations of producers to membership in grain exchanges.

Permit dealing in futures, but only in certain markets, thirteen in number, designated by the secretary of agriculture.

Empower the Secretary of Agriculture to compel grain exchanges to make regulations preventing manipulation of the market.

Require exchanges to exercise diligence preventing dissemination of false crop reports.

(9) An instructive case on this point is reported in 46 LRA (n. s.), 650, and is followed by a case note. The same decision is reported in 124 CCA, 206. Another instructive case on this point is in 48 CCA, 729.

Require exchanges to keep records of all transactions for inspection by the Secretary of Agriculture or Department of Justice.

In an editorial in the same paper, of August 26, 1921, there appeared the following:

"By postponing its decision to eliminate trading in 'puts and calls' until it heard that both houses of congress had adopted the conference report on the Capper-Tincher bill regulating grain exchanges, the Chicago Board of Trade indicates that in the matter of deathbed repentances it is keeping just one jump ahead of the undertaker.

"It had better be careful or the undertaker may carry it away some day with its soul unshriven. After the Illinois legislature's defeat of the Lantz bills, which would have virtually destroyed the Board of Trade in Chicago, *The Tribune* called to its attention certain admissions of error in its practices which were made in the course of its struggle for life. Among these malpractices were trading in 'puts and calls' and the misuse of the private wire system, both features of manipulation and speculation which could not be defended on the ground on which *The Tribune* defended 'hedging' and legitimate trading in futures.

"Almost immediately afterward officials of the board announced that such evils, which had given ground for the concerted attack upon the very existence of the exchange, would be corrected. It even named a committee to correct its errors. But, relieved of the attack which imperiled its life, the board seems to have forgotten its danger.

"Now comes the Capper-Tincher bill, and again the board sees its danger and decides to reform. Let us hope that the present reformation will be complete and effective. We believe the Board of Trade is a valuable marketing medium for the farmer and a valuable asset for Chicago. We would hate to see it abolished. But if it is not to be abolished it must keep faith with the people.

"The Lantz bills were not the first attack upon it. They probably will not be the last. It must prepare now to conduct its affairs in such a manner that no legitimate arguments can be offered against it in the future."

Professor Emery closed an article on "Some Evils of Speculation" with the fol-

lowing: "It will be seen then that speculation by a wide public has its advantages, but that these advantages are secured at an enormous cost. The widening market is simultaneously the cure of some evils and the cause of others. The former are mainly economic, the latter moral. Neither should be disregarded nor minimized. The difference in the nature of these evils makes comparison difficult. Professor Cohn begins a recent essay on speculation with the assertion that business methods cannot escape the test of moral judgment. No one today will question the truth of such a statement. Yet one may well pause before the difficult problem of determining at just what point the evil of public speculation becomes too high a price to pay for the advantages of the active market. Gaming must be specially pleaded and there is, in 181 Ill., 199, an approved form of declaration in an action to recover treble the amount lost in gambling on grain. The evidence sufficient to establish the fact that a transaction in grain or stocks was a gambling transaction is shown in a great many cases in McNeil's Ill. Ev. 585, et seq., and 217 Ill. App., 70, is a late case on the sufficiency of evidence. Inference as to the character of the transactions arising from the fact that they were upon margin is the subject of a Note in 22 LRA (n. s.), 174 and instructions in such cases may be seen by reference to Cranston's instructions to juries, Vol. 1, Chap. 35 (Gaming.) The intention of a broker and his customer to engage in a series of gambling transactions may be established by *implication* and the customer is entitled to have the jury so instructed.¹⁰ In Missouri the purchase or sale of a commodity for future delivery is void when only one of the parties intends it as a wager on the market movements, to be settled by payment of differences.¹¹

To any person well informed on the subject of what is being done on the great

(10) 20 Ill. App., 76, see also McMath's "Speculation and Gambling," 39, and 20 Cyc, 965, as to instruction.

(11) 118 C. C. A. 542, Mo. Anno. Stats., 1906, Vol. 2, Sec. 2438.

stock and produce Exchanges of the country, it must be apparent that the Exchanges should not be interfered with as to the transaction of legitimate business further than necessary to protect the public, but that gambling on the Exchanges, and more especially in the offices of some of the brokers, should be suppressed. The welfare of the people is the paramount law and a careful consideration of the Hughes Committee Report will serve as a guide, to some extent, in the preparation and drafting of wholesome legislation.

JAMES C. McMATH

Chicago, Ill.

FIXTURES—GRAND STAND SEATS.

HANDLAN v. STIFEL

232 S. W., 245

St. Louis Court of Appeals, Missouri. June 21, 1921. Rehearing Denied June 29, 1921.

Where a lease of land for a baseball park provided the lessee should erect a "suitable grand stand," and that if the lessee did not exercise his privilege to purchase the land, then at expiration of the term the grand stand and all other improvements made on the property during the term should become the property of the lessor, rows of seats, placed in the grand stand by the lessee, secured to the wooden floor by light screws, and easily removable, were not "fixtures," and an integral part of the grand stand passing to the lessor on expiration of the term, but were removable by the lessee.

ALLEN, P. J. This is a suit in equity whereby plaintiff seeks to enjoin the defendants from removing certain seats from a "grand stand" in a baseball park formerly occupied by the defendants under a lease from plaintiff. At the time of the institution of the suit some of the seats in question had been removed from the grand stand, but under a stipulation of the parties they were restored to the premises, and a temporary restraining order theretofore granted by the court was dissolved. The trial below upon the merits resulted in a judgment in favor of the defendant, dismissing plaintiff's petition, from which judgment plaintiff prosecutes the appeal now before us.

There is but little, if any, dispute as to the facts. Plaintiff was the owner of a tract of land located at Grand and Laclede avenues

in the city of St. Louis, suitable for a baseball park. On January 22, 1914, plaintiff leased the land to the defendant Stifel, as lessee, for a term of three years, beginning April 10, 1914, at a yearly rental of \$10,000, which lease was subsequently assigned by Stifel to his codefendant the St. Louis Federal League Baseball Company. In addition to the rental the lessee agreed to pay all taxes, general and special, assessed against the leased premises, and as a further consideration agreed to erect a "suitable grand stand" on the property during the term of the lease, at his own cost and expense. The lease does not prescribe the purposes for which the lessee shall use the premises; and there is no restriction or limitation upon the use thereof, except that the lessee shall not use the property, or suffer it to be used, for any purpose or proceeding prohibited by law or ordinance. The lease provided that the lessee should have no right to make any sublease, in whole or in part, or assignment of any of his right, title, or interest under the lease, until the above-mentioned grand stand had been erected and paid for by him. By the terms of the lease the lessee was granted the privilege of purchasing the property at any time during the term, for \$250,000. The lease further provided as follows:

"In the event of the failure of the lessee to exercise the privilege to purchase, then said grand stand and all improvements made on aforesaid property, during the term of said lease, shall be and become the absolute property of lessor at the expiration of said term."

Pursuant to the terms of the lease, Stifel, as lessee, erected a grand stand upon the property and then assigned the lease to the baseball company, a Missouri corporation engaged in giving baseball exhibitions for profit. Thereupon said company installed in the grand stand more than 6,000 seats or chairs for the accommodation of its patrons, the seats being installed in rows conforming to the aisles and exits, and in order to prevent them from tipping over they were screwed to the floor of the grand stand by small screws, and were bolted together in such manner as to enable any seat to be readily removed. In the boxes which were in the forward part of the grand stand, there were loose or detached seats or chairs, but they are not here in controversy. In addition to the grand stand, the company erected other improvements on the leased premises, and in April, 1914, began giving baseball exhibitions there. The right of purchase given to the lessee was not exercised and prior to the expiration of the term of the lease the baseball company began to remove the seats, resulting in the institution of this suit.

During the pendency of the appeal in this court, both plaintiff and defendant Stifel have died, and the cause has been duly revived in favor of Eugene W. Handlan, Alexander H. Handlan, and Edward W. Handlan, executors of the will of A. H. Handlan, deceased and against Ella Stifel, executrix of the will of Otto F. Stifel, deceased.

The only question here involved is whether these seats remained personal chattels, or whether they became a part of the realty so as to pass to the plaintiff, as lessor, upon the expiration of the lease. What is termed the "floor" of the grand stand was of wood, and consisted of tiers of low platforms, each elevated perhaps 11 inches above that in front of it, upon which the seats rested. While the seats were fastened to the wooden surface beneath them by light screws, the evidence shows that they could be readily removed, with reasonable care, without doing any material damage to the surface upon which they rested. The argument for appellant is not here predicated, to any extent, upon the character of the annexation, but proceeds rather upon the theory that the agreement of the lessee, in the lease, to provide a "suitable grand stand," included the furnishing of seats or chairs therein. It is said that when the lessee contracted to erect a suitable grand stand he contracted to furnish everything necessary for that purpose; that "a grand stand without seats would be as useless and anomalous as a grand stand without a roof; and that the lessee would have no more right to remove the seats than to remove the floor.

Whether a chattel which has been annexed to the freehold becomes a part of the realty or otherwise is in general a question depending for its solution upon what may appear as to the actual or presumed intention of the parties. Such intention may be inferred from the nature of the article affixed, the relation to the freehold of the party making the annexation, the character of the annexation, and the purpose for which it was made. Where the question arises between landlord and tenant, as here, the law looks with favor upon the right of the tenant to remove as personalty, articles furnished or installed by the tenant for the purpose of his occupancy, though they may ordinarily be termed fixtures. See *Spalding v. Columbia Theatre Co.*, 189 Mo. App. 629, loc. cit. 635, and cases cited, 175 S. W. 269. See, also, *Electric Co. v. Gottlieb*, 112 Mo. App. 226, 86 S. W. 901; *St. Louis Radiator Mfg. Co. v. Carroll*, 72 Mo. App. 315; *Walker v. Tillis*, 188 Ala. 313, 66 South, 54, L. R. A. 1915A, 654.

In general, when the annexation is made by the tenant, and is of such character that the chattel may be removed without material injury to the freehold, the presumption prima facie is that he did not intend to make a permanent accession to the freehold, but intended to reserve to himself the title to the thing annexed. See *Ballard v. Alaska Theatre Co.*, 93 Wash., 655, 161 Pac. 478; *Newcastle Theatre Co. v. Ward*, 57 Ind. App. 473, 104 N. E. 526. In the instant case, the tenant should be accorded the right to remove the seats in question, being essentially trade fixtures provided by the tenant and removable without material injury to the freehold unless the terms of the lease should be held to be such as to have the effect of prohibiting such removal. The lease does not mention seats or chairs, *eo nomine*, at all. The lease merely provides that the lessee shall "erect a suitable grand stand," and that, if the lessee does not exercise his privilege of purchasing the land, then, at the expiration of the term, "the grand stand and all other improvements" made on the property during the term shall become the property of the lessor. If these provisions operate to prevent the removal of the seats in question, it must be upon the theory, advanced by appellant, that the requirement to erect a grand stand includes, by intendment at least, a grand stand that is equipped with seats; and that when so equipped the seats became an integral part of the structure. Much stress is laid by appellant upon the use of the word "suitable," but under the circumstances, it is by no means clear that by the use of that word, without qualification or explanation anything more was meant than that the grand stand should be "suitable" in size, proportion, architectural design and safety, considering the character of the tract of land, or park, and the other conditions present. While it may be reasonable to suppose that a grand stand, when in use, will be provided with seating facilities of some character, the term, "grand stand" does not in itself, we think, imply permanent seats or seating facilities of any particular nature. And we think that it cannot well be held that by the terms of this lease the lessee bound himself to equip the grand stand with seats to become and be an integral part thereof. We are inclined to the view that the provisions of the lease in this respect would have been complied with by the erection of a suitable structure for use as a grand stand though the lessee had seen fit to use therein loose or detached chairs when the premises were in use, or had used mere benches for seating purposes. In this connection it may be noted that

the word "erect" is of narrow import, suggesting the idea that the parties had in mind the erection of the main structure. Nothing is said as to equipping the structure, nor does the lease provide for a grand stand fully equipped. Had such been the intention of the parties, it would have been easy indeed to have expressed it in unmistakable language. And we are of the opinion that the right of the lessee to remove "fixtures" of this character which would otherwise exist, ought not to be held to be taken away by terms of such doubtful import as those employed in this lease.

In *Ballard v. Theatre Co.*, supra, the lease provided that the lessee should erect a "theatre building," of standard construction, to cost at least a certain sum, and to become the property of the lessors. The lessee company completed the building, equipped it, and operated it for a time as a moving picture theatre. Upon surrendering the premises, the lessee undertook to remove from the building certain equipment, including chairs, when the lessors brought suit to enjoin the removal thereof. It was held that the lessee had the right to remove such equipment; the injunction being denied. It is true, as pointed out by appellant, that in the *Ballard* Case the requirement was that the lessee erect a "theatre building," not that the lessee provide a "theatre." But in the case before us we think that the term "grand stand," as used in the lease, should be taken as having reference to the main, permanent structure contemplated; and should not, under the facts of this record, be extended by implication to include matters of equipment provided by the lessee, which may be classed under the head of trade fixtures, especially in view of the fact that the right asserted by appellant is in the nature of a forfeiture.

In *Sosman v. Conlon*, 57 Mo. App. 25, cited by appellant, the controversy arose, not between landlord and tenant but between the owner and one claiming a mechanic's lien. Likewise, *Groez v. Jackson*, 6 Daly (N. Y. Com. Pl.) 463, *Waycross Opera House Co. v. Sosman et al.*, 94 Ga. 100, 20 S. E. 252, 47 Am. St. Rep. 144, *Halley v. Alloway*, 10 Lea (Tenn.) 523, and *Dimmick v. Cook*, 115 Pa. 573, 8 Atl. 627, cited by appellant, are cases which arose under mechanics' lien statutes. In *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, 109 Am. St. Rep. 853, the action was between the administrator of a deceased mortgagor and the purchaser at a sale under a judgment foreclosing a mortgage. In *Neher v. Viviani et al.*, 15 N. M. 460, 110 Pac. 695, the controversy

arose out of a contract concerning the erection of an opera house, and not between landlord and tenant. In *Gould v. Springer*, 206 N. Y. 461, 99 N. E. 149, the action was between landlord and tenant, but the question involved pertained to the obligation of the tenant to repair defective chairs in a theatre, under the terms of a lease. Language may be found in these cases apparently lending support to appellant's contention, but the facts involved are not such as to make any of them persuasive authority in the instant case. Nor do we think that the decision in *Spalding v. Columbia Theatre Co.*, supra, is here in point.

We are of the opinion that the judgment is for the right party, and that it should be affirmed. It is so ordered.

NOTE.—*Seats as Fixtures.*—In *Gould v. Springer*, 206 N. Y. 641, the Court said: "Chairs so made as to conform to the plan and shape of the theater, fastened to the floor and used for no other purpose except to seat the audience, are fixtures attached to the realty. The old theory which made physical annexation the sole test has been expanded so far as to include intention, use and adaptability. This seems to be conceded by both parties and the contention is in accord with the authorities. The question is usually a mixed one of law and of fact and the court could have found that the chairs which were repaired were an indispensable part of the theater and that they came within the provisions of the twenty-sixth clause of the lease. Unlike the scenery, wardrobe, properties, etc., mentioned in the eleventh clause, the chairs were not mentioned at all in the lease, but passed only as a part of the building itself, which was leased as the Grand Opera House."

"The building in which these seats or iron chairs were put up was constructed as a theater, and the seats for the audience were as much a part of the theater as any other portion of the structure. There could be no doubt wooden seats or benches which were formerly in use in the parquette or pit of a theater, nailed to the floor, would be regarded as a part of the structure itself. * * * Instead of the ordinary benches for the use of the audience in the pit or parquette of a theater, a patent iron chair has come into use in the last sixteen or seventeen years, but the manner in which these iron chairs are put down and adapted for the use of the audience make them as much a part of the structure as the wooden benches which were formerly nailed to the floor." *Gross v. Jackson*, 6 Daly 463.

In *Neher v. Viviana*, 110 Pac. (N. M.) 695, the question arose as to the proper meaning of the term, "a modern \$30,000 theater building," as descriptive of a building which the plaintiff had agreed to erect. The trial court defined this phrase in an instruction as follows: "You are further instructed that the phrase, 'a modern \$30,000 theater building,' includes, in addition to the bare building, the usual, necessary, permanent equipment, such as plumbing, heating and lighting apparatus, seats, curtains and scenery adapted to and intended for use in that particular building,

but not the piano, furniture, carpets and similar articles movable and practically as well adapted to use elsewhere."

In the case of Waycross Opera House Co. v. Sossman, 94 Ga. 100, in discussing the question as to whether the seats, scenery, etc., of a theater were an integral part thereof, or mere chattels used in connection therewith, the Court said: "In a strict sense, these articles, or some of them, may not be fixtures; but they are nevertheless essential to the completeness of a building of that kind. They necessarily form a part and parcel of the edifice itself."

ITEMS OF PROFESSIONAL INTEREST.

A FAMOUS TRIAL OF OLD DAYS.

The most famous of all murder trials in English legal history, is that of Thurtell and Hunt, which took place at Hertford Assizes, before Mr. Justice Park, in January, 1823. Its only rivals in celebrity, perhaps one ought rather to say notoriety, are those of Eugene Aram, Courvoisier and Madeline Smith. The former, of course, has a dramatic interest which must last as long as men are interested in the lives and misfortunes of their fellows. The trial of Courvoisier for the murder of Lord William Russell at Swiss Cottage in 1830, is of immense interest to lawyers, because it raises the perennially recurring question—what should an advocate do when his client has confessed to him that he is guilty. And the last was intensely interesting to a generation less acquainted with the possibilities of feminine audacity than our own; it is not likely to retain in the twentieth century the fascination it had for the second moiety of the nineteenth. But the case of Thurtell and Hunt, while lacking in any exceptional characteristics, seems likely to be remembered as long as there remains a Criminal Bar in England.

One other famous trial, or rather series of trials, must also be mentioned when any attempt is made to enumerate the classical forensic occasions of English criminal jurisprudence. That is the case of the Tichborne claimant. Here there was no murder, nor indeed a tragedy of any kind, to enlist human interest. There were two trials, a civil claim to an ancient landed estate, and a criminal prosecution of the claimant for perjury. The subject was one which will always have a fascination for the populace; it represented the everlasting struggle of the masses and the classes in a very piquant form. A poor man's son claimed fraudulently to be the heir to an old estate. The masses sided with him because he was a

poor man kept out of his own! The mere fact that he was an imposter, all unconsciously, added to that sympathy. The classes hated him, as a vulgarian impudently desiring a place in the sun for which his manner and his appearance and his accent proclaimed him obviously disqualified. A dim suspicion that he might really be a genuine victim of circumstances, a gentleman born who had lost the characteristics of his class and would not do them credit probably rather increased the disfavor with which society as a whole watched the progress of Arthur Orton's impudent pretensions to be Sir Roger Tichborne. Moreover, the Chief Justice who presided, Sir Henry Hawkins who prosecuted, and Dr. Kenealy who defended, were all giants in the forensic world. The trial was dramatic, not only in the incidents which the testimony of its multitudinous witnesses brought to light, but also in the scenes between bench and bar.

No such interest can be claimed for the case of Rex v. Thurtell and Hunt (*supra*). The crime was unspeakably sordid. The counsel on both sides were not men of any distinction, nor were they permitted—by the harsh laws then in force—to deliver addresses to the jury. No displays of eloquence marked the progress of the case. Nor was the trial judge brilliant; he was notorious as one of the "old women" of the courts, and his banalities mark every stage of the proceedings. The trial, too, lasted but one day and a half. At first sight it seems difficult to account for its extraordinary fame.

Yet of that fame, with contemporaries and even among literary lawyers and law students, right down to the present day, there can be no doubt. Innumerable accounts of the trial exist. Sergeant Ballantine devotes to it some of his most brilliant pages. George Borrow, author of the Bible in Spain, visited the convicted murderer in jail before his trial, and gave to the world an affecting account of his sins, his sufferings, and his fascination. Archbishop Whateley, too, wrote about them in language better suited to a romantic hero than a brutal murderer. Broadsheet after broadsheet—the predecessors in that age of the modern "Penny Dreadful"—was issued in the year following his execution, describing all the scenes of his trial and his expiation at the gallows. And some famous verses, the authorship of which is by some attributed to Borrow and by others to Whateley, commemorates the crime in those familiar lines:—

"They cut his throat from ear to ear,
His brain they battered in;
His name was Mr. William Weare,
Who dwelt in Lyons' Inn."

What, then, gave to the sordid crime its celebrity? Before answering, to the best of our ability, this puzzling question, we must narrate briefly the main incidents of the crime for the benefit of those among our readers who have forgotten them. A brilliant account, including a verbatim report of the trial with some interesting appendices, will be found in a recent volume of the "Notable Trials Series," edited by Mr. E. R. Watson. To Mr. Watson's introduction, lucid and picturesque, we must refer those readers who wish in succinct form more detailed information about the case.

Weare, the victim of this crime, was a retired bookmaker and billiard marker, who lived in chambers in the famous old inn, now pulled down, then known as "Lyons' Inn." He had one peculiarity which proved his undoing, a distrust of banks and of solicitors. So he carried in his pocketbook all his savings, investments and bank notes, amounting to thousands of pounds. This fact became known to a broken ex-marine officer named Thurtell, who had been a pugilist and a trainer, not to speak of other occupations even less reputable of which he had made trial. Thurtell determined to decoy Weare into the country and murder him. So, in October, 1822, he persuaded Weare to leave with him in a cab with a gun for a few days' shooting in Hertfordshire. Thurtell drove him along the Great North Road in a gig belonging to a confederate named Probert, who had a cottage near Radlett, off the road to St. Albans. This gig had a bald-faced nag, a fact which has become famous. Thurtell drove Weare towards Radlett; they stopped at many an inn for "refreshment," and only approached Radlett late at night. Then Thurtell shot his victim, and, to make sure, cut his throat with a hunting-knife. Probert and another confederate, a wretch named Hunt, then appeared on the scene, divided the booty between them, and threw the body away—first into a pond at Probert's cottage, afterwards into another pond some distance away. Probert's wife, without their knowledge, saw much of these subsequent events, and was an important witness at the trial.

The execution of the crime was almost inconceivably clumsy. The shot fired was heard by a laborer. He reported it to a magistrate of Hertfordshire. The latter visited the scene, found blood on the ground, and traced the body to the lane running past Probert's cottage. Other witnesses then stated that they had seen Thurtell driving Probert's gig; the bald-faced nag was the source of their identification. The gig, when examined, had been recently washed.

Thereupon, Thurtell, Hunt and Probert were arrested. Hunt confessed, and showed the spot where the body was found and identified. Probert turned King's evidence, and his wife was a principal witness; had not Probert been allowed to turn approver, her evidence—of course—would not have been admissible. The case was plain. Notwithstanding an eloquent speech in his own defense, Thurtell was convicted and hanged. Hunt, also convicted, was reprieved and transported.

Why, in such sordid circumstances, did the crime achieve such fame? There were two reasons. Thurtell was a favorite of the "fancy," or ring of pugilists and spectators; he was famous much as a great kinema actor, say Charlie Chaplin, is famous today. The public were intensely interested in his fate. Again, he was an ex-officer who had fought for his country in the great Napoleonic war; such an ex-service man commanded in those days a sympathy not wholly unknown today, among the common people, in a similar case, where the accused have fought for their country. Nor is this strange. The instinct of the herd feels that a man who has been brutalized by the experience of war, is deserving of pity almost as much as blame if he commits a brutal crime. —*Solicitors' Journal*.

BOOK REVIEW.

McMATH'S SPECULATION IN GAMBLING.

Mr. James C. McMath, well-known lawyer and law writer of Chicago, Ill., has just published an accurate and concise treatment of the subject of Speculation and Gambling in Options, Futures and Stocks.

The subject of this new book is interesting. There never has been a period in our history when gambling and speculation have been more common than in the last ten years. More millions have been lost by the "dupes" and the "lambs" of the stock and grain markets than there have been thousands won. The game is fixed for the professional gambler to win nine out of ten times, but still the fools go in hoping that they may belong to the lucky "tenth."

The law is against gambling and a transaction tainted with the element of speculation is illegal. This rule of law is well known, but the decisions of the courts in applying this rule and in enforcing the remedies which the

law gives to the parties to a gambling transaction are not so well known. No modern law book sufficiently covers the subject and while there have been many valuable articles on the subject in our law periodicals, no one has hitherto brought them together in convenient form for use by the practicing lawyer. This, however, has been done by Mr. McMath in a way that will commend itself to every lawyer. While the work calls particular attention to the Illinois cases, with which the author is naturally most familiar, it is not in any sense a local book. The author treats the subject from the standpoint of the legal historian and economist. He seeks to find the reason for the law's attitude and the public dangers sought to be averted by the law in suppressing the tendency toward gambling. This method of treatment leads the author to suggest some new laws which will more effectively guard the public welfare at this point.

Not the least benefit which this book confers on the lawyer is the furnishing of a more correct nomenclature and more accurate definitions of terms used in describing the various transactions which we call generally speculation and gambling. He calls attention to clear distinctions existing between a "future" and an "option." He defines "wagers," "future deliveries," "puts and calls," etc., and thus enables lawyers interested in particular cases to make distinctions that may be important to their success.

This is a book which is not written for profit alone; it is not a pot boiler. The author is a lawyer of large practice, but with high ideals as to the duty of the lawyer to serve his profession and to assist in the development of the law. For the labor and thought expended in producing this volume, the author is to be congratulated and should receive grateful recognition on the part of the profession.

Bound in paper and buckram and published by the author.

HUMOR OF THE LAW.

An income-tax form was returned recently with the following remark, "Sir, I belongs to the Foresters and don't wish to join the Income Tax."

In a suit recently tried in Boston it happened that one of the witnesses was a personal friend of a lawyer on the other side and that it was his duty to cross-examine her. By reason of their friendship he was if possible, a

trifle more personal with her than he would have been with another witness.

"Can you be trusted with a secret?" he asked at one juncture of the cross-examination.

The woman drew herself up proudly. "You have known me for ten years haven't you?" she asked in turn.

"Yes."

"Well do you know how old I am?"—*Pittsburg Chronicle-Telegraph*.

Judge: "Are you guilty or not guilty?"

Rastus: "Ef ah answered dat question, judge, it 'ould spoil dis here trial."

Solicitor to Client: "Well Sandy, seeing that I knew your father, I'll make it six pounds."

Sandy: "Guid sake, mon! I'm glad ye did na ken my grandfather."

Pedestrian (to traffic cop). Officer, what is the quickest way to the hospital?"

Cop. "Well, you cross here and you'll be there in 15 minutes."—*De Notenbraker (Amsterdam)*.

A certain lawyer was asked by an acquaintance how it was that lawyers contrived to remain on such friendly terms with each other, although they were famed for their cutting remarks.

The lawyer looked at him with a twinkle eye, and remarked:

"Yes, but they're like scissors; they only cut what comes between."—*Japan Advertiser*.

Client: "I want you to get some money back for me."

Lawyer: "On what ground?"

"Fraud. I sent a dollar to the fellow who advertised to tell how to take out wrinkles in the face."

"And did he tell you?"

"He did. He said to walk out in the open air at least once a day and the wrinkles would go out with me."

An applicant for a job on the police force was being put through an oral examination. He answered the questions satisfactorily until he came to this one:

"If a fire broke out in a deaf and dumb institution on your beat, what would you do?"

He scratched his head for a moment and then answered brightly:

"I would ring the dumb bells."

He was ordered to report for duty the following morning.—*American Legion Weekly*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Arrest—Warrant.**—Members of the metropolitan police force of the city of St. Louis have no authority to make an arrest for violation of the National Prohibition Act, unless armed with a warrant issued by one of the officers mentioned in Rev. St. U. S. § 1014, charging the person to be arrested with having violated such act.—*Lenski v. O'Brien*, Mo., 232 S. W. 235.

2. **Assault and Battery—Insulting Words.**—Insulting words may furnish excuse or justification in civil prosecutions.—*Choate v. Pierce*, Miss., 88 So. 627.

3. **Attorney and Client—Compromise of Judgment.**—An attorney, to whom a judgment was intrusted for collection, had no power, in the absence of express authority, to bind his client by a compromise of the amount due on the judgment, and if he agreed to accept less than was actually due in full satisfaction, the client was at liberty to ignore the compromise and collect the full amount.—*Seaward v. De Armond*, Ore., 198 Pac. 916.

4. **Bankruptcy—Judgment of Referee.**—The refusal of the referee to appoint as trustee the persons first elected by the creditors, because that person did not reside at the place of the bankrupt's business, will be confirmed, where the evidence was not reported, and the referee's report did not show whether the duties of the trustee would be such as to require someone who would be in daily contact with the business.—*In re Jaffee*, U. S. D. C., 272 Fed. 899.

5. **Mortgaged Property.**—It is within the discretion of the District Court to order the property of the bankrupt sold free of the mortgage covering it.—*In re Leslie-Judge Co.*, U. S. C. C. A., 272 Fed. 886.

6. **Preference.**—Where a bankrupt corporation had issued bonds secured by mortgage and such bonds had been accepted by a creditor in satisfaction of his claim, but after bankruptcy the bonds and mortgage were held void as creating a preference by an insolvent under the state law, the creditor was restored to his original rights as an unsecured creditor.—*In re Franklin Brewing Co.*, U. S. C. C. A., 272 Fed. 828.

7. **Widow of Partner.**—Evidence held insufficient to show that the widow of a deceased partner became a member of a partnership with the surviving members of the firm and subject to adjudication in bankruptcy as such.—*Cameron v. National Surety Co.*, U. S. C. C. A., 272 Fed. 874.

8. **Banks and Banking—Lien on Deposit.**—Where a corporation's note to a bank gave the bank a lien on any deposit of the corporation with the bank for the payment of the note and all other debts owned by the bank against the corporation, and provided that they should become due and payable in case of insolvency or the occurrence of anything evidencing insolvency, the lien was not displaced or affected by the appointment of a receiver for the corporation, and the bank could apply a deposit on a note matured by the maker's insolvency, notwithstanding the receiver's appointment.—*Wright v. Seaboard Steel & Manganese Corporation*, U. S. C. C. A., 272 Fed. 807.

9. **Bills and Notes—Contingency.**—A contingency to avoid a note must be apparent either upon the face of the note or upon some contemporaneous written memorandum on the same paper.—*Bavarian Brewing Co. v. Reikowski*, Del., 113 Atl. 903.

10. **Carriers of Goods—Good-faith Delivery.**—In an action to recover the difference between the interstate through rate and the sum of the interstate and intrastate rates on lumber shipped to defendants at O. and reshipped to M., the real issue was whether the shipments were in fact shipments to O., with an actual good-faith delivery to defendants at O., and reconsignments actually by defendants, having received possession at O.; and the existence of an original and continuing intention to reship at O., for the purpose of saving expense, was not of itself sufficient to convert the shipments into through shipments if there was otherwise a good-faith delivery at O.—*Baltimore & O. S. W. R. R. v. Settle*, U. S. C. C. A., 272 Fed. 675.

11. **Carriers of Passengers—Alighting.**—In an action for negligence in throwing a passenger from a street car step while she was alighting, an instruction that defendant owed the obligation to permit the plaintiff to alight from the car in safety was erroneous, as being equivalent to a direction of a verdict for the plaintiff, because it made defendant liable as an insurer if it either failed to carry or discharge the plaintiff safely.—*Weiser v. Dry Dock, E. B. & B. R. Co.*, N. Y., 138 N. Y. S. 856.

12. **Arrest.**—It was not the duty of a railroad's conductor in the protection of a passenger arrested by an officer for inducing contract labor to leave the state, though he had information that the officer had no warrant, to assume from such fact that the arrest was unlawful, and that he was authorized or that it was his duty to prevent or protest against the arrest, or detention of the passenger, the railroad not being liable for his failure; to justify a conductor in interfering with a known officer in making an arrest on his train the case must be plain and unmistakable.—*Chesapeake & O. R. Co. v. Pack*, Ky., 232 S. W. 36.

13. **Assault.**—Where the conductor makes a sudden, unprovoked willful and malicious assault on one riding on rear of street car, without warning, and without affording him an opportunity either to pay his fare or to leave the car in safety, the injured person is entitled to recover, regardless of whether or not the relation of passenger and carrier exists.—*Lampe v. United Rys. Co. of St. Louis*, Mo., 232 S. W. 249.

14. **Negligence.**—Failure to assist crippled passenger, knowing he would probably be injured, is wanton negligence.—*Mobile Light & R. Co. v. Therrell*, Ala., 88 So. 677.

15. **Negligence.**—It is not negligence for a carrier of passengers by railroad to announce the name of the station before the train stops, as required by Ky. St. § 784, nor to open the vestibule doors to enable passengers to alight from the train.—*Louisville & N. R. Co. v. Spears*, Adm's. Ky., 232 S. W. 60.

16. **Commerce—Interstate Telegram.**—Congress held to have assumed regulation of interstate telegram, superseding state penalty for delay.—*Western Union Telegraph Co. v. Sims*, Ind., 131 N. E. 520.

17. **Rate Regulation.**—The authority given the Interstate Commerce Commission by Transportation Act Feb. 28, 1920, § 416 (3, 4), to prescribe a rate or fare on intrastate commerce to be observed by a carrier subject to its jurisdiction, if, after a full hearing, it shall find that

a rate or fare imposed by state authority 'causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce,' which rate or fare so prescribed shall be observed, while in effect by the carriers thereby, "the law of any state or the decision or order of any state authority to the contrary notwithstanding," is within the constitutional power of Congress to regulate interstate and foreign commerce.—*Lehigh Valley R. Co. v. Public Service Commission*, U. S. D. C., 272 Fed. 758.

18. **Corporations—Adverse Claim.**—Where a shareholder in a corporation without authority prepared an adverse claim against an application for a patent to adjacent mineral lands, he is not entitled to recover expenditures; it appearing the corporation did not request any such service, and that it made a settlement with the adjoining owner by which the area in conflict was secured.—*Hartman v. Oatman Gold Mining & Milling Co., Ariz.*, 198 Pac. 717.

19. **Payment of Dividends.**—Under proper agreement with the officers, directors, or other stockholders, a balance due on corporate stock may be paid by the application of dividends, but such payment can neither be effected by an unearned dividend nor by mere increment of capital assets without an actual distribution, and a mere general understanding between the stockholders that whenever the profits reach an amount equal to the minimum unpaid capital stock the subscriptions shall be considered paid does not amount to an actual distribution for such purpose.—*Bank of Morgan v. Reid, Ga.*, 107 S. E. 555.

20. **Public Utility.**—The franchise of the public utility corporation and the property devoted by it to the performance of the duties imposed on it by the franchise constitute an entirety, and the property, neither in its entirety nor in parcels, can be separated from the franchise, and, since the franchise is deemed the principal thing and is an incorporeal hereditament, the entire property assumes the character of personality.—*Superior Water, Light & Power Co. v. City of Superior, Wis.*, 183 N. W. 255.

21. **"Transacting Business."**—Under Rem. Code, 1915, § 206, permitting a corporation to be sued in any county where it transacts business, a corporation, by caring for, cultivating, and harvesting orchard lands acquired by foreclosure of its mortgage thereon, under Laws 1917, p. 291, § 37, held not "doing business" or "transacting business" in the county where the lands were situated.—*State v. Superior Court, Wash.*, 198 Pac. 744.

22. **Costs—Attorney's Fee.**—Where an injunction is sued out to restrain sales of property under mortgages, deeds of trust, or judgments, the 5 per cent. damages allowed under the provision of section 623, Code of 1906, for the dissolution of such injunction includes all damages, and no more can be recovered, and this is true even though there is an appeal to the Supreme Court from the judgment dissolving the injunction, and, consequently, where the 5 per cent. damage has been recovered in the court below, no attorney's fee will be allowed here for defending the judgment on appeal.—*Smith v. Perkins, Miss.*, 88 So. 531.

23. **Deeds—Delivery.**—Where a grantor, in order to prevent her deceased brother's family from getting any of her property upon her death executed and recorded a deed of the same to another brother, from whom she had not heard for years, and who was reported to be dead, and retained the deed in her possession, there was no delivery, as the grantor did not intend to convey a present interest to her brother, but only to pass the title to him at her death.—*Lawton v. Campau, Mich.*, 183 N. W. 203.

24. **Drains—Liability of Sureties of Commissioner.**—When a county drain commissioner issued orders in favor of a contractor before the work was begun, in violation of Comp. Laws 1915, § 4904, as amended by Pub. Acts 1917, No. 316, it was an act done by virtue of his office, and the sureties on his bond are liable to a

bank which purchased such orders for the resulting injuries.—*People v. O'Connell, Mich.*, 183 N. W. 195.

25. **Electricity—Negligence.**—Where the owner of a building who had first produced his own electricity, maintaining his own dynamo and switchboard, contracted with a lighting company, and after such service was begun his employee received fatal injuries from electric shock received from the switch maintained by the owner, the current being furnished by the lighting company, such company is not liable for the death, resulting from the negligent manner in which the switchboard was maintained.—*McFerran v. Merchants' Heat & Light Co., Ind.*, 131 N. E. 544.

26. **Eminent Domain—Property Outside State.**—The state cannot condemn property beyond its borders, and over which it exercises no jurisdiction whatever.—*Superior Water, Light & Power Co. v. City of Superior, Wis.*, 183 N. W. 255.

27. **Fixtures—Machinery Parts.**—Machinery parts installed by tenant in a gin plant and which lessor had agreed that lessee might remove upon expiration of lease did not become a part of the real estate.—*Taylor v. Walker, Ark.*, 231 S. W. 550.

28. **Rights of Parties.**—In deciding whether an article used in connection with real property should be considered as a fixture and a part and parcel of the land, as between a grantor and a grantee or mortgagor and mortgagee, the usual tests are: (1) Real or constructive annexation of the article to the realty; (2) appropriation or adaptation to the use or purposes of the realty with which it is connected; (3) the intention to make the annexation permanent.—*First State & Savings Bank v. Oliver, Ore.*, 198 Pac. 920.

29. **Guaranty—Telegram.**—Where creditor agreed to release a debtor as security of payment of debt if debtor would get third party to guarantee the claim, and where debtor asked third party to wire creditor of his (debtor's) standing, without informing third party that creditor desired that third party become responsible for debt if debtor did not pay it, third party's telegram to creditor: "J—debtor) reliable people. Any justifiable claim will be taken care of promptly"—did not guarantee payment of debt, but merely stated third party's opinion as to debtor's financial responsibility.—*Fain Grocery Co. v. Early & Daniels Co., N. C.*, 107 S. E. 497.

30. **Infants—Stock Transactions.**—Stockbrokers, sued by an infant to recover moneys deposited with them to margin stock transactions, can rely on the defense that plaintiff infant, by his false and fraudulent representations as to his age, induced them to accept and disburse his moneys, and that, after such disbursement in accordance with his direction, he, on a plea of infancy, seeks to recover the sum from the brokers so deceived, as such action on his part constitutes an improper attempt to use his infancy, both as a sword and a shield.—*Falk v. MacMasters, N. Y.*, 188 N. Y. S. 796.

31. **Innkeepers—Negligence.**—Where a hotel guest sues for an injury caused by the defective condition of an elevator or negligence in its operation, a presumption of negligence arises on proof of the injury, though defendant is a lessee of the building in which he conducts the hotel.—*Bullard v. Rolader, Ga.*, 107 S. E. 548.

32. **Insurance—Authority to Acquire Building.**—The fact that a building acquired by an insurance company was equipped with a heating plant designed to heat an adjoining building also does not make the acquisition of such building an ultra vires act, where the company was authorized by Rev. St. Tex. 1911, art. 4735 to acquire and own one building site and office building for its use, and for lease and rental.—*Farmers' Life Ins. Co. v. Foster Building & Realty Co., T. S. C. C. A.*, 272 Fed. 864.

33. **Note in Payment of Premium.**—Where insured, who gave a note for the first premium on a life policy, retained the policy and made no effort to return it until the note had matured and the policy lapsed, he could not, after having the protection of the policy for one year, defeat an action on the note by showing that

he could not read or write, and was induced to sign the application by false representations as to the terms of the policy, and did not discover its real terms until after the note matured, and then offered to surrender it.—*Wilcox v. Walker*, Ga., 107 S. E. 560.

34.—**Provisions of Policy.**—Where an accident insurance policy, providing weekly indemnity for injuries and indemnity for death, provided indemnity for death sustained in the manner specified in certain clauses, excluding a clause covering accident on a public highway from contact with any moving conveyance or vehicle, it did not cover death from being struck by a train at a highway crossing, though another provision of the policy provided that it did not cover injuries sustained on the roadbed of any railway, "except while crossing at a public highway."—*Williamson v. Great Eastern Casualty Co., Ind.*, 131 N. E. 522.

35.—**"Voluntary Exposure."**—The fact that the insured was killed while voluntarily aiding a peace officer in the fresh pursuit of persons reasonably suspected of having committed a crime, and seeking to escape, will not, as a matter of law, defeat recovery in an action upon a policy of accident insurance under a provision thereof that the insurer shall not be liable in case of "voluntary exposure to unnecessary danger"; but the question whether, in performing his duty as a citizen, the insured incurred needless risk is for the jury.—*Sackett v. Masonic Protective Ass'n*, Neb., 183 N. W. 101.

36.—**Intoxicating Liquors.**—Flavoring Extracts.—C. S. §§ 3367, 3368, 3369, 3370, 3373, prohibiting the sale of and solicitation for sale of intoxicating liquor and other concoctions containing alcohol, do not prohibit the sale of flavoring extracts containing 40 per cent. of alcohol to be used for flavoring and not beverage purposes, under section 3375, excepting flavoring extracts from the applicability of such prohibition statutes.—*State v. Barksdale*, N. C., 107 S. E. 505.

37.—**State Statute.**—The state statute making unlawful the possession of intoxicating liquors others than alcohol is not superseded by the Volstead Act, enacted pursuant to Const. U. S. Amend. 18.—*State v. Woods*, Wash., 198 Pac. 737.

38.—**Use of Automobile.**—Under C. S. § 3403 providing that the sheriff seizing any liquors had or kept in violation of law shall seize the automobile used in conveying them, and that upon conviction defendant shall forfeit all right, title, and interest in the property so seized, it is only the right, title, and interest of the defendant in the automobile seized that may be forfeited, and, upon conviction of an employee for possessing and transporting spirituous liquors in his employer's automobile, the automobile is not subject to forfeiture.—*State v. Johnson*, N. C., 107 S. E. 433.

39.—**Landlord and Tenant.**—Breach of Contract.—Where a lease provided that the tenant might clear additional lands and cultivate them during the life of the lease without extra rental, he could not, after abandoning the premises before the expiration of the lease recover compensation for his services in clearing the land, without proof of any violation of the contract by the landlord, as a party who has not broken his contract is under no obligation to respond to the opposite party, otherwise than by performing his covenants under the contract.—*Holton v. Blocker*, Ga., 107 S. E. 550.

40.—**Measure of Damages.**—The measure of damages for injury to a leasehold estate is the difference in the market value immediately before and after the injury, subject to the qualifications that, if such property as may be destroyed or removed, although it is a part of the realty, has a value without reference to the soil on which it stands or out of which it grows, a recovery may be for the value of the thing destroyed or removed, and not for the difference in the value of the land or leasehold before and after such destruction or injury.—*Producers' Supply Co. v. Maple Leaf Oil Co.*, Okla., 198 Pac. 577.

41.—**Nuisance.**—An owner of land whose tenant or licensee after entry on it under his lease or license, maintains thereon a private nuisance

erected by himself, working injury and detriment to an adjacent tract of land, as by altering the course of a natural stream of water, so as to make it carry and discharge its waters on and over such adjacent land, is not a necessary nor proper party to a bill by the owner of the injured land, to abate such nuisance by injunction, unless the work or business authorized by the lease or license was such in its nature and character as would necessarily constitute the nuisance or work the injury complained of.—*McMechen v. Hitchman-Glendale Consol. Coal Co.*, W. Va., 107 S. E. 480.

42.—**Remodeling.**—Plans for the remodeling of an apartment house, by removing partitions and making other interior changes, without interfering with the foundations, walls, roofs or floors, showed no intent to demolish the building for the purpose of constructing a new one, within the meaning of Laws 1920, c. 942, defining circumstances under which a landlord may recover possession of real property, the test established being clear and free from ambiguity.—*Rosman Realty Corporation v. Quinn*, N. Y., 188 N. Y. S. 807.

43.—**Libel and Slander.**—Publication.—In a suit for slander, it is no defense that the words were spoken to, and not of, plaintiff, when heard by others.—*Nichols v. Chicago*, R. I. & P. Ry. Co., Mo., 232 S. W. 275.

44.—**Life Estates.**—Savings Deposit.—A savings bank holds in trust for the heirs of a deceased remainderman the amount of the deposit which passed on the death of the life tenant with authority to apply the principal, though the life tenant gave the deposit to one of the heirs, and the bank had considered it to belong to her.—*Bishop v. Groton Sav. Bank*, Conn., 114 Atl. 88.

45.—**Master and Servant.**—Admissibility of Evidence.—In an employee's action for injuries, evidence of a conversation between the employer's superintendent and the defendant's head machinist, who were plaintiff's superiors, and the employer's representatives, showing that they recognized and commented upon the existence of a leaking throttle valve of an engine, was admissible to show their knowledge of such defect, and hence to impute such knowledge to the employer, but was not admissible as original evidence of the existence of the defect.—*Tennessee Coal Iron & R. Co. v. Carson*, Ala., 88 So. 650.

46.—**Course of Employment.**—Where the employer did not furnish transportation, but merely paid the extra wages amounting to car fare which the rules of the labor union required him to pay when the place of business was not within the single trolley fare limit, the employee being left free to pay his own transportation or not, he was not injured in the course of his employment when struck by a motorcycle as he crossed the highway at a place where he had been waiting for a trolley car to get a ride on a motor truck after he had left work.—*Orsline v. Torrance*, Conn., 113 Atl. 924.

47.—**Dependent.**—The fact that a sister of a deceased employee had the right to compel her adult children to support her does not prevent her from being a dependent for whom it was the purpose of the Compensation Act to provide support, where she in fact relied upon contributions from the employee, since a "dependent" within the Workmen's Compensation Act is one who has relied upon the employee for support and has a reasonable expectation that such support will continue.—*Driscoll v. Jewell Belting Co.*, Conn., 114 Atl. 109.

48.—**Fireman Not "Employee."**—A regularly appointed member of a city fire department is an officer and not an employee in the sense that he is not in service of contract of hire, so that firemen were not included in the Workmen's Compensation Act prior to its amendment by statute of 1917, p. 835, so as to make the term employee include all elected and appointed paid public officers.—*Jackson v. Wilde*, Cal., 198 Pac. 822.

49.—**Loss of Eye.**—A workman, a miner, who met with an accident to his left eye, resulting in an ulcer and permanent scar, reducing the vision in such eye to 5 per cent. lost the eye, within the meaning of the Workmen's Compensation Act, though he returned to work, taking up the same employment, and earning as much as before the accident, and compensation was

properly allowed during the course of development of the injury to a permanent result, so that the employer and insurer are not entitled to be credited upon the compensation allowed by the law for the loss of an eye with the weekly payments advanced during such course of development of the injury.—*Stammers v. Banner Coal Co.*, Mich., 183 N. W. 21.

50.—*Traveling Salesman*.—A traveling salesman, performing the usual and customary services for his employer, who could rightfully discontinue work or be discharged at any time, and was actually controlled by his employer in the performance of his work, held entitled an employee within the Workmen's Compensation Act, p. 4, § 1, and not an independent contractor, although he was not upon the pay roll of the employer, and was not paid wages, receiving his compensation by way of commission.—*United States Fidelity & Guaranty Co. v. Lowry*, Tex., 231 S. W. 818.

51. *Municipal Corporations*—Charges for Water Meter.—The city of Montgomery furnishing meters to measure the water used by its customers so as to compute the charges permissible under Act Jan. 26, 1891, cannot make an extra charge for the meter.—*City of Montgomery v. Smith*, Ala., 88 So. 671.

52. *Physicians and Surgeons*—Negligence.—In an action against an X-ray specialist for injuries to a patient in treating her, instruction that the result of the treatment in the particular case (that is, the sores caused) might be regarded as some evidence of negligence, was erroneous in view of proof that the specific result might come from proper treatment without negligence in a case of a person hypersensitive to the X-ray.—*Antowill v. Friedmann*, N. Y. 188, N. Y. S. 777.

53. *Principal and Agent*—Ratification.—Where salesman took two orders simultaneously from purchaser, an acceptance of one of the orders by the employer of the salesman was not an adoption or ratification of the salesman's act in contracting to deliver the other, where the employer upon receiving the orders immediately notified purchaser by telegram that it would accept only one order and would not accept the other and only accepted that on condition that the time of shipment be changed, whereupon purchaser telegraphed instructions for the shipment of the one order, but did not refer to the other.—*Deane v. Elk Spring Distilling Co.*, Md., 113 Atl. 891.

54. *Railroads*—Duty to Dog on Track.—Trainmen, upon discovering a dog upon the track, or in known dangerous proximity thereto, are required to avoid unnecessary injury; but they may act upon the presumption that the dog will get out of the way in time to avoid injury, or that it will not move into danger, provided there is nothing in the circumstances of its approach or its manner of being upon the track to indicate to a reasonably prudent operator that it is helpless or indifferent to its surroundings and danger.—*Hines v. Schrimacher*, Ala., 88 So. 661.

55.—Negligence.—Making flying switch across footpath used by public, negligence.—*Kansas City Southern Ry. Co. v. Craig*, Okla., 198 Pac. 578.

56. *Sales*—Lever Act.—Lever Act, § 4, which has been construed by the United States Supreme Court as establishing no test for determination of reasonableness of prices and charges so as not to define a crime, is, for the same reason, insufficient in a civil action as a defense against recovery of the contract price of necessities sold to defendant.—*Standard Chemicals & Metals Corporation v. Waugh Chemical Corporation*, N. Y., 131 N. E. 566.

57.—Liability for Lien.—A purchaser, or one who obtains possession, of personal property on which there is a lien evidenced by a duly recorded title note, is not personally liable on the note, where his name does not appear thereon, and he has not in any way agreed to pay it.—*Central Kansas Motor Co. v. Kline*, Kan., 198 Pac. 949.

58.—Rescission.—In an action against one who gave an order for four cars of lumber which specified, "If this car is satisfactory when it comes in, then we will take the other three cars, to be shipped at the rate of one car per month, or faster if we can get our customers

to take it," correspondence held to show a cancellation of the order as to three cars by mutual consent.—*Skillman Lumber Co. v. Love*, Mich., 182 N. W. 210.

59.—Warranty.—Personalty may be sold with or without warranty, and where there is an express stipulation that the property is not warranted the law will not imply a warranty.—*Crampton v. Lamonda*, Vt., 114 Atl. 42.

60. *Sunday*—"Servile Labor."—Ordinarily, the selling of tickets and the managing and operating of a moving picture show on Sunday is not "servile labor," nor "selling, offering or exposing for sale of any commodity," within the meaning of section 2404, Rev. Laws 1910, and section 2405, as amended by Laws 1913, c. 204.—*Treese v. State*, Okla., 198 Pac. 889.

61. *Telegraphs and Telephones*—Public Use.—Though defendant's tenant gave plaintiff telephone company permission or a license to maintain a line over a rocky portion of defendant's farm, and plaintiff company, relying on the license, constructed a line, it cannot, having no right in the beginning, enjoin defendant from interfering with its line, unless it condemns the right of way.—*Western Telegraph & Telephone Co. v. Lavelle*, Vt., 113 Atl. 870.

62. *Trade Unions*—Management.—Where a trade union incorporated as a membership corporation had affiliated with an unincorporated federation of such unions, the federation and its president did not thereby acquire authority to interfere with the internal management of the trade union, by reinstating an officer who had been suspended in accordance with the by-laws of the union; but the only remedy of the suspended officer was under the by-laws of the union, and the only action the federation could take was to withdraw the right of affiliation.—*Kunze v. Weber*, N. Y., 188 N. Y. S. 644.

63. *Trusts*—Resulting Trust.—Husband who furnished consideration for conveyance taken in his wife's name, now claiming after she had divorced him, remarried, and died, that the conveyance was one on resulting trust for him, held guilty of inexcusable laches in prosecuting his claim.—*Clary v. Fleming*, Mont., 198 Pac. 546.

64. *Vendor and Purchaser*—Option.—Where a contract for the purchase of land on installments provided that in event of the purchaser's default the vendor might forfeit all rights under the agreement and retain amounts paid, the provision was one clearly for the benefit of the vendor giving him an option, but the purchaser has no option which will allow him to abandon the contract on pain of forfeiture of installments paid.—*New Richmond Land Co. v. Ivanovich*, Cal., 198 Pac. 221.

65. *Warehousemen*—Loss by Fire.—Where an elevator firm procures a policy of fire insurance covering its own grain and that held in trust for which it is legally liable, and a fire consumes the elevator and its contents, it is the duty of the elevator firm to make claim and proof of loss to the insurance company for the grain thus held in trust and for which it is legally liable.—*Farney v. Hauser*, Kan., 198 Pac. 178.

66. *Wills*—Intent.—One to whom a will devised land with provision that his sisters were to have a home there when needed, and that if he did not comply with the condition, but refused to give them a home when sick or out of employment, the land should be divided equally between them, having after death of testatrix accepted under the will, his interest in the land was not affected either by any statement of his before testatrix's death, when his rights were not fixed, that his sisters should not have a home there, nor by the fact that after such death one of them, who would have had a right to go there for a home, did not seek it, believing from what he had so previously said that it would be refused.—*Adams v. Henry*, Tex., 231 S. W. 152.

67.—Life Estate.—An absolute power of sale or disposal attached to an express life estate will not enlarge it into a fee, although the power is to convey a fee, and where an estate for life is expressly given, and the power of disposition is annexed to it, the fee does not pass under such devise, but the naked power to dispose of the fee, although it is otherwise in case there is a gift generally of the estate, with power of disposition annexed.—*Gildersleeve v. Lee*, Ore., 198 Pac. 246.

Central Law Journal.

St. Louis, Mo., October 7, 1921.

THE SUPREMACY OF LAW.

It is a weakness of the advocate that in his partisan zeal he is carried to extremes and often bases his case upon grounds which, to his own unbiased mind would seem "absurd and excessive extravagance."

Mr. George B. Gillespie, in his able argument for the exemption of a governor from arrest and criminal prosecution while in office, as published in the *Central Law Journal* for September 2, 1921, (Vol. 93, p. 149) illustrates this. He goes to the extreme of denying such fundamental American principles as the equality of men before the law, and the supremacy of the law itself. His arguments for the independence of the other departments of a government from interference by the courts, if pressed to their logical conclusion, would go to the extent of exempting any legislative or executive officer from legal proceedings while in office, since they might interfere with the performance of his official duties.

He contends that the governor alone is authorized to determine the scope of the powers of the executive and when they are immune from the judiciary. He inquires, "What right has the court, under a constitution, to construe the constitution for its governor and require him to accept its will?" He criticises the Wisconsin court for arrogating to itself the exclusive right to determine what are and what are not lawful duties of the governor under the constitution.

But as Chief Justice Marshall once said, "It is emphatically the province and duty of the judicial department to say what the law is. This is the very essence of judicial duty." It is well recognized

in American constitutional law that there must be authority somewhere to determine whether the proper constitutional sphere of a department has been transcended, and thus prevent conflict. It is the power and duty of the courts to interpret the laws and the constitution and so to define the scope of legislative and executive functions. (*People v. Bissell*, 19 Ill. 229). The oath of the governor to take care that the laws shall be faithfully executed and to uphold the constitution means the law and the constitution as interpreted by the courts. If officers depart from the powers which the law has vested in them, the courts no longer consider them as officers but treat them as individuals.

The equality of all persons before the law and the supremacy of law mean, as Dicey points out, (1) the absence of arbitrary power on the part of the executive, including the military arm over the citizen; (2) that every official, civil and military, is subject to the ordinary tribunals at all times for acts done in excess of his lawful authority; (3) that no one can plead the command of a superior in defense of conduct not apparently justified by law; (4) that executive authority is not above, but below, the law, and cannot set it aside. (Dicey, *Law of the Constitution*, [8th Ed.] pp. 183, 198, 282, 538). It is entirely possible to give full scope to the demands of public safety and necessity within the law without exalting executive and military officers above the law.

Mr. Gillespie makes a plausible argument in behalf of the wisdom and expediency of exempting the chief executive of the state or nation from interruption in his official duty by legal proceedings. It may well be that these arguments would be found persuasive by the courts and that such exemption might be allowed on grounds of public necessity and welfare in the conduct of government. But this is for the courts to determine.

Whether an English Colonial Governor can be tried on a criminal charge in his own colony does not seem to have been judicially determined, and the dicta are conflicting. (Ridges, English Constit. Law, [2nd. Ed.], 464).

In *Musgrave v. Pulido*, (Appeal Cases, Vol. 5, p. 103) (1879-80), which was an action of trespass brought against the governor of Jamaica for seizing a schooner, the defendant claimed immunity from liability to be sued in the courts of the Colony. The Privy Council refused to uphold this plea to the jurisdiction, and in the course of the opinion spoke as follows:

"The dictum attributed to Lord Mansfield in *Fabrigas v. Mostyn*, (1 Cowp. 161), that 'the Governor of a colony is in the nature of a Viceroy, and therefore locally, during his government, no civil or criminal action will lie against him; the reason is, because upon process he would be subject to imprisonment,' was dissented from and declared to be without legal foundation in the judgment of the Lords of the Judicial Committee delivered by Lord Brougham in the case of *Hill v. Bigge*, (3 Moore, P. C. 465). The action was for a private debt contracted by the defendant in England before he became Governor, but the principle affirmed by the judgment is that the Governor of a colony, under the commission usually issued by the Crown, cannot claim, as a personal privilege, exemption from being sued in the Courts of the colony.

"Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state. When questions of this kind arise it must necessarily

be within the province of Municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defense is complete, and the Courts can take no further cognizance of it. It is unnecessary, on this demurrer, to consider how far a Governor, when acting within the limits of his authority, but mistakenly, is protected."

The great mistake of Governor Small has been his lawless attitude of threatening to use the power of his office to defy the courts and resist arrest. He was ill-advised by his counselors. Such questions as constitutional privilege from arrest cannot be decided by physical force, but only by reason and argument in the courts.

It is not the purpose of the writer to discuss this interesting question in detail, but reference should be made to one or two arguments advanced, which seem beside the point. The contention that the prosecution of a governor is futile because he would have the power immediately to pardon himself can hardly be taken seriously. The governor would, of course, be disqualified from acting as judge, or pardoner, in his own cause. This would seem to be an obvious implication.

The contention that the governor, as commander-in-chief of the militia, might exercise military force to resist arrest is equally specious. As the Kentucky Court of Appeals said in *Franks v. Smith*, (142 Ky. 232, 134 S. W. 484, L.R.A. 1915A, 1141), "To say that the state militia, acting in obedience to military orders, may commit any act that may suggest itself to the commanding officer as being necessary to restore peace and quiet, although such act might be a greater violation of the law than was committed by the person it was vested upon, would place the militia above the civil authority, and give to the soldier power not conferred upon the civil officer charged with the duty of enforcing the

law. . . . We can find no warrant, either in the Constitution or statute of the state or the history of Constitutional Government, for investing the military forces of the state with arbitrary power like this."

The contention that the militia would be bound to obey the illegal commands of the governor is also answered in this same case and in many cases collected in the note to it in L. R. A. 1915A, p. 1141. The great weight of authority is that persons engaged in the military service of the state or nation can find no justification or protection in orders which are illegal on their face or such as a man of ordinary sense and understanding would be justified in deeming illegal.

The court further says in *Franks v. Smith*, "As the chief civil magistrate of the state he calls out and must direct, in accordance with law, the movements and operations of the military forces. 'The military shall be at all times and in all cases in strict subordination to the civil power.' It is so written in Section 22 of the Bill of Rights. We have not and cannot have in this state a military force that is not and will not be subordinate to the civil authorities. . . . The soldier and the citizen stand alike under the law. Both must obey its commands and be obedient to its mandates."

The sheriff is not a military subordinate, under the orders of the governor, but an officer of the law, and as such armed with power and authority over the governor when the law gives it. It is not true that the acts of the governor as commander-in-chief of the militia cannot be questioned in any place or by any person, or that the courts have no power to determine when the governor is violating the law and the Constitution. The courts, it is true, have no supervisory control over the exercise by the governor of his power to call out the militia to suppress an insurrection, but they will not permit him to misuse the forces when called out, suspend the writ of habeas corpus or right of trial by jury, or establish extra-legal tribunals for

the punishment of crime unknown to the Constitution. (Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B, 988).

It is misleading to cite mandamus cases which hold that the courts will not interfere in the exercise of executive powers or control official actions and to pretend that they prove that the chief executive as an individual is above the restraining authority of the law.

HENRY W. BALLANTINE.

NOTES OF IMPORTANT DECISIONS

CONTRACTS IN RESTRAINT OF REMARRIAGE.—One chance at the matrimonial game is all that the law is willing to guarantee, on the theory, probably, that the first marriage is a necessity and the second a luxury. At any rate the law seems to be clear that while contracts in restraint of marriage are said to be void, the rule does not apply to remarriage, and that widows and widowers can be restrained from re-embarking on the sea of matrimony by jealous spouses or others who wish to attach such a condition to the bounties they distribute in their wills.

This rule is illustrated by the recent case of *Stauffer v. Kessler*, 130 N. E. 651, where the Appellate Court of Indiana held that a provision in a deceased wife's will, providing that a life estate given to her husband should terminate immediately upon his remarriage was valid. On this point the Court said:

"It is a well settled general rule of law that contracts in restraint of marriage, being against public policy, are void. Appellants concede that the said provision in the deed is a condition and not a limitation, nor do appellants controvert the general rule that contracts in restraint of marriage are void, but they insist that this general rule has no application to second marriage.

"Pomeroy in his excellent treatise on Equity Jurisprudence (2 Pom. Eq. Jur., 4th ed., Sec. 933), says:

"It seems to be settled by an overwhelming weight of authority that limitations and conditions, precedent or subsequent, tending to restrain the second marriage of women are valid, and by the most recent decisions the same rule has been applied to the second marriage of men."

"The trend of judicial decisions, both in this country and in England, sustains Pomeroy's

statement (*Bostick v. Blades*, 59 Md., 231, 43 Am. Rep., 548; *Appleby v. Appleby*, 100 Minn., 408, 111 N. W., 305, 10 L. R. A. (N. S.), 590, 117 Am. St. Rep., 709, 10 Ann. Cas., 563; *Allen v. Jackson*, L. R., 1 Ch. Div., 399; *Newton v. Marsden*, 2 J. & H., 356). The reason given by the courts is that the rule as to first marriages has no substantial force when applied to second marriages; that a contract in restraint of a second marriage is a reasonable one the prevention of which is not a matter of public concern."

RECENT DECISIONS IN THE BRITISH COURTS.

The writer is not aware how far the principles of private international law obtain in the United States. His impression is that they are rather weakened by the fact that there is in the presence of the Supreme Court, an overhead authority which, to a certain extent, prevents each separate state developing a law of its own foreign to the general law of the union. The consequence of this is that in the state courts there may not be frequent occasions for the application of the principles of private international law.

We may here refer to the case of *MacFarlane v. Macartney*, 1921, W. N. 63. A testator, domiciled in England, left an illegitimate daughter, born after his death, in Malta, by a Maltese woman, to whom he was engaged. His assets comprised estates in both countries, though the executors proved the will in England. Four years later, at the suit of the mother, the Maltese Court of Appeal granted a posthumous affiliation order, which is unknown in England, and fixed an alimentary allowance.

The question was whether this judgment could be enforced in England. Counsel for the claimant contended that the declaration of paternity was a judgment *in rem*, carrying with it the necessary consequences of alimony, and that property moved from Malta to England could be followed.

Astbury, J., held the Maltese judgment unenforceable on three grounds: (1) the recognition of the right of an illegitimate child to permanent alimony was contrary to the policy of English law; (2) the judgment was founded on a cause of action unknown in England; (3) the judgment was only *in rem* as regards the declaration of paternity, but *qua* the assignment of alimony was *in personam* against the executors, and, therefore, could not be enforced as a debt against the assets in England.

One of the provisions of the Court's Emergency Powers Act passed under war conditions

was to exempt army officers from bankruptcy proceedings. In *re A Debtor*, 37 T. L. R. 154, a receiving order was made by the Registrar against a demobilized officer. He had not been gazetted out of the service, nor had he received any notice of discharge. The construction of the Court's Emergency Powers Acts exempting officers from bankruptcy proceedings was not disputed. The question was whether the appellant debtor was an officer, and so protected, or not.

It was held that on demobilization an officer's position becomes that of a volunteer liable to be called up; it is analogous to that of a man liable to military service and not called up. This could not interfere with his civil occupations, and it would be absurd to hold that it did. The object of the provision was to protect officers and men actively engaged in warfare and to save them from civil worries. Therefore, a demobilized officer resumes his civil status as far as concerns the Acts, and is liable accordingly.

Leyman v. The King, 36 T. L. R. 835, raised the question whether a private soldier could sue the Crown for his pay. The facts were that an ex-corporal of the R. A. S. C. enlisted in Jersey, in September, 1914, on a special engagement at 6s. a day. On removal to Aldershot, he was again attested and given a pay-book, which stated his rate of pay to be 6s. a day. After twenty months he was informed that he was a time-serving soldier, with pay at the then ordinary rate of 1s. a day. He was compelled by his commanding officer to refund the difference which he had been receiving between 6s. and 1s. This amounted to £120, which seems later to have been refunded to him by way of bounty.

The corporal now prayed for payment at the original rate, from the time payment was reduced until his discharge, in 1919. The solicitor-general demurred to the petition, arguing that the relations between a soldier and the Crown were entirely at the pleasure of His Majesty, and not a matter of contract.

It was held that there was a species of contract between the soldier and the Crown, but it was of a kind which did not carry with it all those rights, to enforce by process of law obligations corresponding to those which the law attaches in the ordinary course to contracts between subject and subject.

In *Rawlings v. General Trading Co.*, 37 T. L. R. 252, the plaintiff claimed an account of profits arising out of an agreement with the defendants at a public auction of government

stores that they would keep down the price by not bidding against each other and that they would share the profits of purchases made in this way.

The Court of Appeal (Scrutton, L. J., dissenting) allowed an appeal from the decision of Shearman, J., who had held that the agreement was unlawful as contrary to public policy. This defense was not raised upon the pleadings.

Atkin, L. J., held that this agreement could be unlawful as in restraint of trade only if it were unreasonable from the point of view of the public. As this point had not been raised upon the pleadings, and as no evidence to that effect had been brought, the Court could only hold the contract unlawful if it appeared *ex facie* to be unreasonable; the Court were not entitled to make the inference from the terms of this contract.

Scrutton, L. J., dissented on the ground that the contract was unreasonable from the point of view of the public, since by such contracts they were deprived of the advantage of free competition at auctions. Moreover, the goods sold in this case were the property of the community. Through the illegality of the contract had not been pleaded, he considered that all material facts were before the Court.

It is difficult to see the force of the argument that the agreement was contrary to public policy by reason of the fact that the goods for sale were the property of the state. For it could hardly be in accordance with public policy that "knock-outs" should be illegal at auctions of government stores, though legal at auctions of private property. The real question at issue would seem to be whether "knock-outs" are legal under any circumstances.

The decision of the Court is a further illustration of the reluctance of the Courts in modern times to decide cases according to the judges' views of public policy, which can be dealt with by legislation. On this point, see the judgments of Gorell Barnes, P., in *Hyams v. Stuart-King* (1908), 2 K. B. 696, and of Jessel, M. R., in *Printing and Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462.

In *Marriott v. Maltby Main Colliery Co.*, 37 T. L. R. 123, the Court of Appeal upheld the decision of the County Court judge that the dependents of a workman, who committed suicide owing to abnormal state of mind caused by an accident in the course of his work, could recover compensation. The suicide must be the result of the accident, not of brooding over the

injury received. It is not necessary, however, to prove that insanity is due to "structural" injury to the brain; insanity can be the result of the accident if the shock affects the mental condition.

In this case the suicide was due to melancholia, culminating in insanity; and there was evidence that the melancholia arose through mental shock caused by the accident and through the pain suffered, not merely through the man's brooding over the accident or its results. The suicide was therefore the result of an accident in the course of the man's employment.

How far is drunkenness a defense to murder was the question decided in *Director of Public Prosecutions v. Beard*, 1920, A. C. 479. The prisoner, while intoxicated, committed rape upon a young girl, and in aid of the rape pressed on her throat, with the result that the girl died of suffocation. He was convicted of murder. The Court of Criminal Appeal substituted a verdict of manslaughter, on the ground that the question whether prisoner knew that his act which caused death was dangerous should have been put to a jury. The House of Lords restored the verdict of murder.

With regard to drunkenness as a defense to a criminal charge, the House of Lords expressly decided:

(1) That insanity produced by drunkenness is a good defense, similar, as to proof and effect, to insanity produced by other causes. The insanity may be temporary.

(2) That evidence of drunkenness which renders accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration in order to determine whether or not he had this intent.

(3) That evidence of drunkenness merely establishing that the mind is so affected that restraint and willpower are lessened is no defense, nor does it rebut the presumption that the natural consequences of acts are intended.

In addition it was stated *obiter*:

(4) That drunkenness rendered accused incapable of having intent to do the act, *i. e.*, not merely the specific intent requisite for the crime, but the original intent to act—is a defense.

For a full appreciation of the rule laid down in *Ipswich Permanent Money Club, Ltd. v. Arthy*, 1920, 2 Ch. 257, a somewhat full statement of the facts is necessary. W. S., the sole trustee and part beneficiary of a trust of real property subject to a trust for sale, mortgaged his reversionary interest in 1903 to A., and in 1907 to plaintiffs, without disclosing the previous mortgage to A. The reversionary interest was not sufficient to pay both. The fraud

was discovered in July, 1908, and negotiations ensued between plaintiffs and H. S., the brother of the trustee, who, in September, 1908, procured himself to be appointed a new trustee of the trust estate in order to deal with the situation. No agreement could be arranged; so in October, 1908, H. S. gave notice to both mortgagees of his appointment as trustee, and waited for the reversionary interest to fall into possession. Plaintiffs immediately gave formal notice of their mortgage. Notice of A's charge was given in 1911, when it was assigned to T.

The reversionary interest fell into possession in 1916, and plaintiffs claimed priority on the ground of their prior notice to H. S. in 1908, after his appointment as trustee.

Plaintiffs contended that after an independent person got the legal control of the property, they gave prior notice, by their formal notice in October, 1908, to H. S., after knowledge of his appointment as trustee. Relying on *In re Dallas* (1904), 2 Ch. 385, they contended that no notice to a person who may become a trustee is effectual; notice must be given after his actual appointment; therefore, at the crucial date, September, 1908, H. S. had no effective knowledge of A's mortgage, and the plaintiffs gave first notice. The defendant argued that knowledge is higher than notice, and as upon his appointment H. S. knew A's mortgage, this knowledge continued to operate on his mind and, as a reasonable man, he acted upon it.

Held, that it is well established that the rule does not render it necessary for an incumbent to prove that he gave notice of his charge to the trustee of the fund. It is sufficient to prove that the trustee had knowledge, upon which a reasonable man would direct his conduct accordingly.

Applying the principle of Lord Cairns' judgment in *Lloyd v. Banks* (1868), L. R. 3 Ch. 488, the knowledge of A's mortgage which H. S. acquired before his appointment, and was such that it protected the priority of A's mortgage and prevented plaintiffs' notice from displacing the priority.

In *re Dallas* was distinguished, as in that case notice was given before the fund had actual existence and was merely an expectancy; therefore, the notice in that case was ineffectual. Here the fund was always in existence, and even after it came into legal possession there was no notice which would displace the actual priority.

DONALD MACKAY.

Glasgow, Scotland.

TRADITIONS THAT DISTINGUISH BARRISTER AND SOLICITOR OF ENGLISH COURTS.*

"The best prospect," said Disraeli, "that the law holds out to a man is sport and bad stories until he is fifty and then a peerage."

Two of these rewards are obviously beyond the present reach of the American lawyer, no matter on which side of fifty he may find himself. It must be admitted that there are other differences between the lawyers of England and ourselves hardly less definitive. Of these the most pronounced perhaps are those which spring from the methodical and, from the American point of view, the somewhat rigid organizations of the legal profession itself. In large part this organization is the result of slow moving historical causes, but it springs also from that innate love of established order and custom which is one of the strongest instincts of the English race. The rank and precedence which obtain are not based upon any innate sense of superiority or inferiority among men—indeed the underlying philosophy of the English state is as profoundly egalitarian in point of human rights as that of America—but there is a desire to know and a willingness to recognize the exact limit of the sphere to which one has been assigned by choice or fate that is not felt in a newer society.

Legal Precedence.—The table of legal precedence accordingly is quite definite. It begins at the apex with the Lord Chancellor as the highest legal dignitary of the Kingdom and descends by successive gradation as follows:

The Lords of Appeal.

The Lord Chief Justice of England.

The Master of the Rolls.

The Lord Justices of the Court of Appeal (according to the seniority of appointment) and President of the Probate, Divorce and Admiralty Division.

*Address delivered at the American Bar Association by the former Ambassador to the Court of St. James.

Judges of the High Court (according to seniority of appointment.)

The Judge of the Arches Court.

The Attorney General.

The Solicitor General.

The Judges of the County Courts.

King's Counsel and such as have patents of precedence.

The Recorder of London.

The Common Sergeant of London.

Doctors of Civil Law.

Doctor of Laws.

Barristers-at-Law.

Proctors.

Solicitors.

Among barristers again, there is not only the distinction which prevails between the mere utter barrister in his stuff gown and the King's Counsel in his glistening silk, but there is precedence based upon the date of one's call to the bar, which is not entirely devoid of consequence in professional life. No King's Counsel can hold a brief for the plaintiff on the hearing of a civil cause, in the High Court, Court of Appeal or House of Lords, without a Junior, and it is quite unusual that he should do so even when appearing for the defendant in a civil case or upon a criminal trial.

While among those of lesser rank, no barrister should accept a junior brief for a barrister junior to himself in point of call, and as the table shows any and every barrister outranks all his legal brethren of the lower branch. Indeed, some years ago a solicitor rather bitterly remarked that "a barrister is to a solicitor what a peer is to a law stationer." Among solicitors themselves a greater equality obtains; or perhaps it would be fairer to say that their struggle for existence is neither helped nor hampered by questions of relative rank.

Mere questions of precedence aside, however, the whole scheme of legal life in Great Britain is built upon the hard and fast division between the barrister on the one hand and the solicitor on the other. It is a distinction which tradition, custom and

positive law combine to maintain inviolate and inviolable; and to say that it is analogous to the difference with which we are familiar between the "court lawyer" and the "office lawyer," tells but half the story. Pollock & Maitland assert that, historically considered "these two branches have different roots; the attorney represents his client and appears in his client's place, while the counsellor speaks in behalf of a litigant who is present in court either in person or by attorney.

The separation thus begun between the two orders continues to this day and shows itself not only in function, but in education, in dress, in legal status, in relationship to clients, in compensation and not least of all, in eligibility for public office. Thus a barrister educated at one of the Inns of Court and admitted by its benchers to the bar enjoys in his wig and gown a singular immunity from legal restraint. He is not an officer of the court and the court neither admits him to practice nor has power to disbar him from his profession. He takes no oath of service, nor even of allegiance, for an alien may enjoy full professional status at the English bar. The functions which he is permitted to perform fall into three classes, i. e.—advising upon questions of law; drafting pleadings, conveyances and other documents; and acting as an advocate in the courts. So long as he is of the junior bar he may receive pupils in his chambers; but once made King's Counsel this and the labors of drafting are beneath his professional dignity. To him and to him alone are open all the judicial offices of the Kingdom as well as the great political posts of Lord Chancellor, Attorney General and Solicitor General.

How different the lot of the solicitor! The law, it is true, gives him a quasi monopoly of litigation by ordaining that no one but a properly enrolled solicitor or a litigant in his own person can "sue out any writ or process or commerce, carry on, solicit or defend any action, suit, or any other proceeding in any court in England, or act

as a solicitor in any cause, matter or suit, civil or criminal." But it accompanies this grant with a degree of statutory regulation and legal supervision to which perhaps no other profession is anywhere subject.

From professional birth to legal death, the solicitor moves in the shadow of the law he serves. As an officer of the court he must preface his admission by an oath of faithful service and preserves his status from year to year by taking out an annual certificate on which a tax is paid. The signature of the Master of the Rolls is necessary for his admission but the Law Society, which has the rolls in its keeping, may oust him from his calling for any act of professional misconduct or personal immorality. His fees are rigidly prescribed by none too generous statute and unless he has sheltered himself behind the advice of some presumptively omniscient barrister, damages may be recovered from him for any negligence. He must be a British subject; and while, as the present Prime Minister has brilliantly demonstrated, he may attain the highest political office in the state, yet among legal offices only the most petty are open to him, and his voice may be heard only in the Chancery Chambers, the Bankruptcy Court of First Instance, County Courts and minor tribunals.

The choice between the one life and the other is one that can not be made at convenience. It must be made at setting out, for there is no part of the road which the neophytes of the two professions travel together. For the intending barrister the initial step is enrollment at one of the Inns of Court. There is an old bit of doggerel for the guidance of the student which runs thus:

"The Inner for the rich man,
The Middle for the poor man,
Lincoln's for the gentleman,
And Gray's for the boor."

The necessity for rhyming some word with poor is the only reason apparent for this libel upon Gray's Inn.

Lincoln's Inn Popular.—If a student contemplates practice at the Chancery Bar, he

will follow custom and attach himself to Lincoln's Inn, which no doubt traces its traditional preference for Chancery to the days when the courts of the Vice Chancellor were located on the ground which it now occupies. The Inner and the Middle Temple are more especially the Inns of the common law barrister. The Middle is by tradition the most catholic and democratic of all the Inns, while the Inner, larger at present in point of numbers, is recruited largely from the Universities of Oxford and Cambridge, and it is supposed to entertain certain aristocratic leanings. Gray's Inn, the smallest of the four in point of numbers, makes no choice between the Chancery and the common law bars. It possesses, however, a mellowness and charm of its own, and claims as its patron saints Queen Elizabeth, Lord Bacon and Lord Chief Justice Coke. When an incendiary bomb from a German airplane pierced its roof, it narrowly escaped the Crown of Martyrdom.

The Students Duties.—To discuss in detail the preparation necessary for admission to the bar would be beyond the scope of this address. It is enough to say that the student must address himself to a double duty; first, keeping terms, and second, passing examinations. The so-called dining terms of the Inns are four in each year lasting three weeks each. Twelve terms or three full years, in the absence of some special dispensation, must be kept by dining in hall. Three days in each term is sufficient for those who are students in some university, six days for those less fortunate; and in order no doubt that the student may improve in morals as well as in mind, no attendance is counted in his favor unless he be present at grace both before and after meals. The examinations which precede his call are prescribed in behalf of the four Inns by the Council on Legal Education upon which all the Inns are represented. A course of preparatory lectures is arranged by the Council, which the student is at liberty to attend or ignore;

but whatever method of instruction he may choose, he must absorb sufficient information to pass the required examinations and must digest the quantity of food to which his dining terms constrict him.

Except for the necessity of examination there is little that is similar in the making of a solicitor. Straight is the gate and narrow is the way which he must travel on his professional way. The steps are four in number: First, he must serve as a clerk for three years under a practicing solicitor; second, he must pass the required examinations, conceded to be even more exacting than those demanded from the barrister; third, he must be duly admitted and enrolled; last, he must take out a proper certificate to practice. By the articles of clerkship he binds himself to the service of a practicing solicitor, paying him an agreed premium for his tutelage. In one such contract I recall the amount to have been 250 pounds, the addition of a stamp duty of 80 pounds to be affixed under penalty. The articles when executed must be enrolled and registered at the offices of the Law Society. How rigidly they bind the novitiate appears from the fact that before he enters upon any duty or engages in any employment whatever other than that stipulated in the articles, whether in or out of office hours, he must obtain his principal's consent and the sanction of the Judge. Even though the employment in no way interferes with his service under the articles there is no relaxation of the rules, and the penalty is the loss of credit for so much of his five years' term as had elapsed before the offense.

Thus the barrister and solicitor having entered their callings by different doors, pursue their separate lives to the end. They are not even welcome guests in each other's houses. No barrister can invite a solicitor to sit at table with him in the Inns of Court; and while the barrister may visit the sumptuous and comfortable quarters of the Law Society in Chancery Lane, where solicitors congregate, his frequent coming would lay him open to the suspicion that he was in

search of business. One of the reproaches lodged against the notorious Jeffreys is that he came into full practice by getting acquaintance with the attorneys in the city and "drinking desperately with them." Apparently it is not his habits, but his associations which history condemns.

After this discussion of the ranks and orders into which the legal profession in England is divided, it may seem paradoxical to say that another point of contrast with the profession in America is the greater unity that prevails in England. In comparison with the close-knit organizations sheltered by the Inns of Court and the Law Society, we in America seem as so many scattered English grains of sand. It is difficult to make one familiar only with English atmosphere understand that in truth, notwithstanding this Association, there is no such body as the American Bar. There are instead, scattered groups consisting of county, city and state bars, with a Federal Bar here and there composed in part of the same members, but united by no tie of common origin or discipline.

In England, on the other hand, especially among barristers, there is a sense of solidarity and community of interest to which we do not attain. The companionship of the Inns permeates their entire professional life, and in the days gone by there was added to this the fraternity of the old circuit messes that made their semi-annual rounds of the assize towns. These pilgrimages Dean Swift has satirized in his jingling verses:

"Now the active young attorneys
Briskly travel on their journeys,
Looking big as any giants
On the horses of their clients."

and so on and so on for a hundred lines or more.

Figures are often misleading and generalizations from incomplete statistics are always dangerous; and yet I believe it may be truly said that the average Englishman with all of his proverbial insistence upon his personal rights calls less often upon his courts for relief than does his American

cousin. Who shall come forward with an explanation of this fact if fact it be? Is it a survival of days long gone when justice was not only costly but tardy and uncertain; is it because there exists in England a class of lawyers whose business lies wholly outside the courts and in whose hands many controversies are settled without judicial aid; or is there a reason deeper still in the age-long habit of this island people to respect the law they have made and live their daily lives within its well-marked circle?

Latest although not least of the portents of change are those due to the Act for the Removal of Sex Disqualification, passed in 1919, which has ushered in, not without much wagging of heads, the woman barrister, the woman solicitor and the woman jury member. When mixed juries made their first appearance there was much discussion among the judges and lawyers of the proper method of address, since the time honored "Gentlemen of the jury" was manifestly obsolete. The difficulty finally resolved by the adoption of the somewhat obvious phrase "Member of the jury."

And yet even in courts so modern and so new as the Court of Criminal Appeal, antiquity still rears its hoary head and will not be denied. I recall one case, in which our distinguished guest, (Sir John Simon), was a participant, where the court was called upon to determine the jurisdiction over a charge of perjury of the Justices of the Peace for the liberty of Peterborough, which involved a discussion of English history and of royal charters running back to ecclesiastical grants from Edgar the Saxon and Wolfrane the Elder. What an example such a case affords of the blending of the old and new which is at once the charm and strength of England and of English law? Is not the crown of the political genius of the Anglo-Saxon his ability to make great changes, both in law and government, without resort to violence? His movement may be slow, at times so deliberate as to be imperceptible, but none the less he moves.

The radical of today is the conservative of tomorrow; the rearguard camps at night by the smoking watch fires from which the vanguard departed in the morning; but without breaking ranks or losing touch the whole column moves steadily onward to a broadening future.

When all comparisons have been made, and all differences recounted, the fact remains that the members of the legal profession in England are in very truth our brethren over seas. The common law by which we live has its roots in English soil. The judges who interpret it on both sides of the water look to their distant colleagues for counsel and assistance, and the principles of liberty which it embodies are the rod and staff by which our peoples walk. Trained in the same school, professing the same great ideals, sharers of like immunities and privileges, there rests upon the legal profession in England and America a duty which is joint and not several, complete and not divisible. The nations whom they serve stand today supreme in present strength and truth and in potential energy. Upon them destiny has laid accordingly the largest responsibility for the immediate future of the world. Shall not the lawyers who lead as well as serve them, guide them in the ways of mutual confidence and joint endeavor in the service of mankind?

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NEGLIGENCE—IMPUTED.

COUNTY COM'RS OF DORCHESTER COUNTY v. WRIGHT.

Court of Appeals of Maryland. June 27, 1921.

114 Atl. 573.

Where an employee was, of his own choice and at his own cost, driving his automobile to the place where work was to be performed, his negligence was not imputable to his employer, riding in the back seat of the automobile, and not directing or controlling its operation.

URNER, J. The appellee was one of the occupants of a Ford automobile, which fell through an open draw in a bridge maintained

by the appellants over Cambridge creek in the city of Cambridge. For his personal injuries, thus occasioned, he recovered the judgment which is the basis of this appeal. The only bill of exceptions in the record is concerned with the rulings on the prayers.

The accident occurred at night. It was testified by the appellee, who occupied a rear seat in the automobile, and by George Ricketts, the owner of the car, who was driving it at the time, that there were no lights then observable anywhere on the bridge, and no warnings of any kind were given as to the condition of the draw, and that they did not see the opening into which they fell. According to the testimony offered by the appellants the approaches to the draw were brightly illuminated by two electric arc lamps when the accident happened, and there were red signal lights displayed on the drawbridge, indicating that it was open for the passage of vessels. In view of the conflict of the evidence as to whether the lights required for the protection of travelers on the bridge were in fact extinguished as the draw was being operated on the occasion referred to, the question of primary negligence could not properly have been withdrawn from the jury.

The most important question in the case is whether a verdict should have been directed for the appellants on the ground of contributory negligence. If the appellee had been in the position of the driver of the automobile, it would seem clear that his own negligence had contributed to his misfortune. The car was driven forward on the bridge, at accelerating speed, in spite of the fact, to which Ricketts, the driver, testified, that no signal lights were visible showing whether the draw was open or closed. The occupants of the automobile were familiar with the bridge and the system of lights by which the condition of the draw was intended to be revealed. If the draw was open, red lights were displayed to travelers on the bridge, and, if it was closed, the lights appeared green. As the automobile approached the draw it was moving, as Ricketts testified, at the rate of 4 or 5 miles an hour, and he had begun to increase its speed just before the car plunged into the creek. The headlights of the automobile should have enabled the driver to see some distance in advance, and if he had been as watchful and careful as the conditions demanded, he ought to have seen the draw open and stopped his car in time to avoid the accident. It was certainly not an act of ordinary prudence to proceed merely on the assumption that the draw was closed, if the customary signal lights were not there to assure him that the way was safe. But the

lights were in elevated positions, 20 and 30 feet above the floor of the bridge, and the appellee was on the rear seat of the car, where his view was restricted by the top and curtains. Whether, being thus situated, his failure to anticipate the accident, and intervene to prevent it, was contributory negligence as a matter of law, is the question to be determined.

The negligence of the driver was not imputable to the appellee, as the former was operating the car as its owner, and not as the appellee's agent or employee. For some days preceding the accident Ricketts had been employed by the appellee in the work of gathering holly. They both lived near Federalsburg, and prior to the day of the accident the appellee had used his own car in taking Ricketts and others to the place where the holly was being gathered. On that day the appellee's car was not in a condition to be driven and Ricketts used his car in order that he might be able to return home at night. He was paid nothing for the use of the car; his only compensation being for his day's labor. There is nothing in the testimony to show that the appellee was traveling in the car in any capacity that gave him the right to direct or control its operation. The proof indicates that he was accompanying the owner as a guest. The case is therefore within the rule, which his court has repeatedly applied, that—

"The contributory negligence of a carrier, or of the driver of a public or private vehicle, not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of the passenger to recover for injuries received." *P., W. & B. R. R. Co. v. Hogeland*, 66 Md. 163, 7 Atl. 108, 59 Am. Rep. 159; *B. & O. R. R. Co. v. State*, 79 Md. 343, 29 Atl. 518, 47 Am. St. Rep. 415; *United Rys. Co. v. Biedler*, 98 Md. 574, 56 Atl. 813; *United Rys. & Elec. Co. v. Crain*, 123 Md. 332, 91 Atl. 405; *B. & O. R. R. Co. v. McCabe*, 133 Md. 219, 104 Atl. 465; *W., B. & A. R. Co. v. State*, use of Hall, 136 Md. 109, 111 Atl. 164; *McAdoo v. State*, use of Kuntzman, 136 Md. 452, 111 Atl. 476; *Chiswell v. Nichols*, 137 Md. —, 112 Atl. 363.

But independently of the question as to the driver's failure to exercise due care is the issue as to whether the appellee was also negligent in not observing the danger and endeavoring to avoid injury by timely advice and warning to the driver. It was his individual duty to use ordinary care for his safety, and, if he failed in the performance of that duty, he cannot recover for an injury to which his own negligence thus contributed. This principle is fully supported by the decisions above noted. Whether the passenger has exercised reasonable care under the circumstances is usually

a question for the jury to decide. *Chiswell v. Nichols, B. & O. R. R. Co. v. State, use of Hall, and B. & O. R. R. Co. v. McCabe, supra.* Judgment affirmed, with costs.

NOTE—Negligence of Driver as Imputable to Guest or Passenger.—By the great weight of authority any negligence of the driver of a vehicle is not imputable to a guest or passenger, whether gratuitous or for hire, where such guest or passenger has no right of control over the driver and does not attempt to exercise control over him. In Michigan a distinction is made between passengers in common carriers and persons who are riding gratuitously in private vehicles. The negligence of the driver is not imputable to the former, while it is to the latter. This same distinction was made for many years in Wisconsin, but in the recent case of *Reiter v. Grover, Wis., 181 N. W. 739*, that state aligned herself with the weight of authority as above stated. However, the negligence of an adult driver is held in Michigan not to be imputable to a minor passenger who has no control over the operation of the vehicle. *Ommen v. Grand Trunk W. R., 204 Mich. 392, 169 N. W. 914.*

The rule that the negligence of the driver of a vehicle is not imputable to an occupant riding with him applies as between husband and wife and the various other members of a family.

The above rule, however, has no application where the occupant has the right of control over the driver, or where the driver and occupant are engaged in a common enterprise, and it has nothing to do with the care required of an occupant for his own safety. *Berry, Automobiles (3rd Ed.), Sec. 500 et seq.*, where this whole subject is fully covered and numerous authorities cited.

ITEMS OF PROFESSIONAL INTEREST.

DECLARATORY ORDERS IN THE COMMERCIAL COURT.

A singular difference of opinion was manifested in the House of Lords as to the powers of the Commercial Court to make a declaratory order in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, Ltd. (ante, p. 733)*. The question arose in this way. A Russian bank, whose head office was in Petrograd, but which had a London branch, advanced in June, 1914—just before war broke out—to an English bank the sum of £77,000. This sum was secured by the deposit of certain foreign bonds with the Russian bank. The loan was effected in Petrograd, not then so renamed, and the securities were deposited there. The agreement was evidenced by two letters which provided that the loan should be in roubles, unless sterling could be obtained by the Russian bank's London branch. The agreement did not specify in which currency,

sterling or roubles, the loan was to be repayable; in 1914, when rates of exchange varied round the par of exchange in all directions in every few months, that question had not the importance which later events have given it. In 1919 the English bank sued the Russian bank in the King's Bench Division asking (inter alia) for a declaration that they were entitled to redeem the bonds on payment to the Russian bank, at their London branch, of 750,000 roubles or the equivalent in British currency. This assumed that the loan is repayable in roubles at their pre-war par of exchange. The Commercial Court held that the loan was a loan in sterling, but the Court of Appeal held that it was a rouble loan, and the House of Lords adopted their view. Both Court of Appeal and House of Lords, however, considered that the Commercial Court had no jurisdiction to grant relief by way of redemption, that being a matter reserved exclusively for the Chancery Division by the Judicature Act. The Commercial Court could only grant a declaratory order, without further relief. The result is interesting, for it implies that the Commercial Court, even when it has no jurisdiction to grant any form of relief, as in an action for the redemption of a mortgage, can nevertheless make a declaratory order which is *res judicata* as regards the legal rights of the parties, and therefore binding on all other courts.

It is notorious, of course, that the jurisdiction to grant relief by way of declaratory order under the provisions of Order 25 has been extended of recent years to lengths that would have seemed almost a sacrilege some thirty years ago. Nowadays, declaratory orders are freely granted both in the King's Bench and in the Chancery Divisions when no other relief asked for, and even when no actual breach of contract or other incident creating an actual right of action has yet arisen. But a reaction has been manifesting itself of late against this tendency. In *re Staples (1916, 1 Ch. 322)* the Court of Appeal said that the jurisdiction under Order 25 should be exercised "sparingly," and in *Markwald v. Attorney-General (1920 1 Ch. 348, at p. 357)* Lord Sterndale said that there had been "too great a tendency of recent years to grant declarations." The present case certainly carries the jurisdiction to its extreme limits. In the first place, The English courts had very doubtful jurisdiction to try any action between the parties, as the contract was a Russian contract, made in Russia, for a loan to be repaid in Russia. Mr. Justice Roche, who tried the action in the Commercial Court, felt this difficulty, but as both parties had a

business domicile within the jurisdiction, and as decisions on questions of this kind could not in practice, be obtained just now in Russia, he decided to assist the parties by deciding the point. The second difficulty is that the Commercial Court had no possible jurisdiction, even were the cause cognizable by an English court, to hear and determine a claim by a mortgagee to redeem his mortgage; this is a matter, we need hardly say, reserved for the exclusive jurisdiction of the Chancery Division and ultra vires of every other division. Hence the Commercial Court actually made a declaratory order as to the rights of the parties in a matter over which it had no jurisdiction whatever. In these circumstances, it is not surprising that Lord Finlay and Lord Wrenbury, who may be regarded as two of the most conservative-minded of our law lords, refused to admit that the Commercial Court could even entertain the action. Lord Dunedin, Lord Sumner, and Lord Parmoor took the opposite view, and held that, as a matter of convenience, the declaratory order was justified. There is certainly weighty authority either way.—*Solicitor's Journal (London).*

OWNERSHIP OF BURIED TREASURE.

We read occasionally of some lucky plowman, delver or explorer who unearths property long ago hidden by an owner who is probably dead, and who left behind him no traces of his identity. In this class of cases interesting questions of ownership have arisen.

In *Ferguson v. Ray*, 44 Or. 557, 102 Am. St. Rep. 648, 77 Pac. 600, 1 Ann. Cas. 1, 1 L. R. A. (N. S.) 477, it was held that gold-bearing quartz buried near a marked tree in a bag that had almost entirely rotted away is not to be regarded as lost property or treasure-trove, so that the title will vest in the finder as against the owner of the soil, although the length of time since it was hidden would indicate that the owner is dead or has forgotten it. But in *Danielson v. Roberts*, 44 Or. 108, 102 Am. St. Rep. 627, 74 Pac. 913, 65 L. R. A. 526, it was held that trover would lie on behalf of an employee who finds upon the employer's premises a large sum in gold coin contained in a rust-eaten tin can, which had evidently been hidden and forgotten by an unknown owner, where the employer took the money out of the employee's possession and refused to restore it to him. In the subsequent case of *Roberson v. Ellis*, 58 Or. 219, 114 Pac. 100, 35 L. R. A. (N. S.) 979, these apparently conflicting decisions are distinguished on the

ground that the substance found in the *Ferguson Case* was gold-bearing quartz, which did not constitute gold or bullion within what the Court regarded as the proper definition of treasure-trove, whereas in the *Danielson Case* the substance found was gold coins, which, of course, came within such definition.

The conclusion reached in *Ferguson v. Ray*, supra, finds support in *Burdick v. Chesebrough*, 94 App. Div. 532, 88 N. Y. Supp. 13, where the rule is stated to be that if personal property is deposited beneath the surface of the soil, and so left until the place where it is so deposited is forgotten, and the owner thereof, if living, or his personal representatives, if he is dead, cannot be found, such personal property, so in the possession of the owner of the soil, becomes, as a part of the soil, the property of the owner of the real property; and such personal property passes by gift, sale, or descent of said real property as a part thereof. When it is discovered and removed from the soil, as against everyone but the owner, it becomes the personal property of the owner of such real property, and not the property of the finder thereof.

The rule established by the leading cases gathered in 17 R. C. L. 1200, 1201, however, declares that the title to treasure-trove, in the absence of legislation, belongs to the finder against all the world except the true owner, and that the owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land. The law on the subject is thus stated at the place cited:

"Treasure-trove is any gold or silver in coin, plate, or bullion, found concealed in the earth, or in a house, or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. Originally it belonged to the finder if the owner was not discovered, but afterwards it was judged expedient, for the purposes of state, and particularly for the coinage, that it should go to the King, whose right thereto depended on the same principles as the right to the goods of an intestate. In England, coroners are vested with a limited jurisdiction with regard to treasure-trove, confined to an inquiry as to who is the finder, and who is suspected thereof. This supervision by the state and right of the Crown created at common law a distinction between treasure-trove and lost property; but in this country the law relating to the former has been merged in that of the latter; at least, so far as respects the rights of the finder. It is not essential to its character as treasure-trove that the thing shall have

been hidden in the ground, for it is sufficient if it be found concealed in other articles, such as bureaus, safes, machinery, etc.; and while, strictly speaking, it is gold or silver, it has been held to include the paper representatives thereof, especially where found hidden with those precious metals; but to exclude gold-bearing quartz found buried in the earth, where it evidently had been placed some years before. It is essential to its character that it shall have been concealed by the owner for safe-keeping, and in this respect it differs from lost property and property voluntarily parted with. The rule in this country, in the absence of legislation, is that the title to treasure-trove belongs to the finder against all the world except the true owner, and in this respect it is analogous to lost property. Where the owner is unknown at the time of finding, and afterwards appears, the only effect is to destroy the character of such property as treasure-trove, and thus defeat the title of the sovereign or of the finder. Treating the property as treasure-trove does not render the finder liable for conversion, as his mistake, if such it may be called, like the refusal of the finder to deliver or demand lost property when the owner is unknown to him, is no conversion, for he is justified in his conduct at the time in treating it as treasure-trove by the presence of all the elements which constitute it such. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land; and so it has been held that workmen finding money which has been buried or secreted on the premises of their employer are entitled to its possession, and may maintain trover against the employer if he deprives them of the possession and refuses to restore it."

HUMOR OF THE LAW.

A certain physician is much peeved because of the lax enforcement of the prohibition laws. He said:

"Why, anyone can get liquor whenever he wants it."

And then, after a pause:

"I'd like to know where they get it. They don't come to me any more for prescriptions."

A rich Cuban needs an ear to replace one he lost in an accident and advertises for a new one to replace it, offering to pay handsomely for the accommodation. Needing the money

and able to spare an ear, a citizen offers to provide it, but the law interposes and forbids it—says it will be mayhem and a jail offense. What a pity! We all know a lot of long-eared "peeping Toms" and "listening Susies" to whom the loss of one ear or both would be a public benefaction.—*Medical Pocket Quarterly*.

An attorney was recently trying to act as peacemaker between an indignant husband and a distrustful and jealous wife. He thought he was making some headway when the husband related an incident that he said was the last straw. He had hurried home to dress for a dinner, which he said was strictly a business affair, and: "What do you think she did? She had cut the seat out of the trousers of my dress suit!"

The attorney gave it up.

Even the Chief Justice of the U. S. Supreme Court can be humorous at times, lawyers attending the American Bar Association convention here learned at one of the sessions on legal education.

Spying William Howard Taft, chief justice, in the audience, Elihu Root, chairman of the session, asked the chief justice to occupy the platform with him.

"I think it is strong enough for both of us," said Root, former Secretary of State.

As he mounted the platform Taft remarked: "This is not the first platform I occupied with Mr. Root, and I can very distinctly recall that one platform was not as strong as we thought it was."—*Cincinnati Post*.

Of old, Pliny informs us, there was a belief in certain parts of Italy that if you wanted to ascertain the secrets of a woman, all you had to do was to place the wing of a chicken over her heart while she was asleep and you'd find them out. According to current newspaper reports, Dr. Edward Hiram Reede, neurologist of Washington, D. C., has a more accurate plan, premised on a more scientific foundation. It is this: first find out the politics of a woman's husband and then learn how his wife voted at the recent election. If hubby voted for Cox and wife for Harding, it's a sign she doesn't love him—the secret is out. Inversely if they voted for the same candidate, all's well in Twelfth Street and the dove of domestic tranquillity hangs over the door. Some of the ladies protest that this is no more infallible a sign than the chicken's wing, but I know a lot of folks who think it's dead right—probably they know.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Army and Navy—Federal Relief Act.**—The federal Soldiers' and Sailors' Civil Relief Act became the law of the individual states and of all the people of the United States under Const. art. 6, subd. 2, and thereby amended Code Civ. Proc. § 382, requiring actions on contract to be commenced within six years by excluding from the time of computation the period of military service so that the court could not acquire jurisdiction over a person in the military service by publication under Code Civ. Proc. § 438, subd. 6, authorizing such service, where the defendant was a resident, and the limitation would have expired within 60 days next preceding the application for publication, if the time had not been extended by the attempt to commence the action.—*Erickson v. Macy*, N. Y., 131 N. E. 744.

2. **Bankruptcy—Attachment Lien.**—Although a defendant receives a discharge in bankruptcy, which he sets up in a plea puis darrien continuance, the suit may still proceed to a qualified or special judgment, to permit plaintiff to enforce a lien by attachment against defendant's property or to bring suit against sureties on the bond given to release such attachment.—*Star Braiding Co. v. Stienen Dyeing Co.*, R. I., 114 Atl. 129.

3. **Chattel Mortgage.**—Under Code S. C. 1912, § 3542, as amended by Acts 1914, p. 482, providing that mortgages shall be valid, so as to affect the rights of subsequent creditors without notice from the time of their execution only when recorded within 10 days from time of execution, with a proviso that "the recording and record of the above mentioned deeds and instruments subsequent to the expiration of the said ten days shall, from the date of such record, have the same effect as to the rights of all creditors and purchasers without notice as if the said deed or instrument of writing had been executed and delivered on the date of the record thereof," a chattel mortgage executed by a bankrupt in good faith for a present valuable consideration and not voidable as a preference, recorded after the 10-day limit, but prior to bankruptcy, held valid as against all general creditors, including those who became such between the time of execution and recording of the mortgage.—*In re F. H. Saunders & Co.*, U. S. D. C., 272 Fed. 1003.

4. **Jurisdiction of Court.**—A court of bankruptcy can stay other suits only under the authority of Bankruptcy Act, § 11, or under the general rule that it may stay suits, even in state courts, which interfere with the administration of the estate in charge of the bankruptcy court.—*In re Havens*, U. S. C. C. A., 272 Fed. 975.

5. **Stay of Proceedings.**—Where the bankruptcy court had granted leave for the institution of foreclosure suit after the election of the trustee, so that state court's jurisdiction over the parties had not attached before the property came into the possession of the bankruptcy court, and it appeared that there were sufficient assets to pay the mortgage sought to be foreclosed, as well as the two prior mortgages, but that the validity and amounts due on the three mortgages were disputed, and the same issue would be presented as to the prior mortgages as was involved in the mortgage on which foreclosure was begun, the further prosecution of the foreclosure proceedings will be stayed.—*In re Locust Bldg. Co.*, U. S. D. C., 272 Fed. 988.

6. **Stockholders' Liability.**—The question whether the liability of stockholders of a bankrupt corporation for the unpaid portion of the purchase price of the stock is an asset of the corporation or belongs to the creditors only depends on the laws of the state where the corporation was organized, and under the laws of Ohio as settled by the decision of its Supreme Court the liability belongs to the corporation, and may be enforced by the trustee in bankruptcy for the benefit of the general creditors, so that the bankruptcy court has jurisdiction generally, under Bankruptcy Act, § 27, to authorize a compromise of such liability.—*Petition of Stuart*, U. S. C. C. A., 272 Fed. 938.

7. **Banks and Banking—Liability of Shareholder.**—The presumption of liability on shares of stock is an insolvent bank, arising from the presence of a person's name on the stock register, is rebutted by evidence that a bona fide sale of the stock has been made, and that the vendor had performed every duty which the law imposed in order to secure the transfer on the registry of the bank.—*State v. Ware*, Okla., 198 Pac. 859.

8. **Title to Funds.**—The chairman of a committee to arrange transportation for state delegates of certain war veterans to their national meeting had no title to funds collected by him from the delegates to cover their transportation and deposited by him in his personal checking account sufficient to subject such funds to garnishment or attachment against him.—*Nathan v. O'Donnell*, Cal., 198 Pac. 1028.

9. **Bills and Notes—Indorsement "For Collection."**—An indorsement of a note "for collection" gives the indorsee such a legal title as authorizes him to bring suit in his own name, providing that the title of the holder of a note cannot be inquired into unless necessary for defendant's protection, or to let in his defense, and section 4299, providing that an indorsement or assignment of a bill or note need not be proved, unless denied on oath.—*Lightfoot v. Head & Cain*, Ga., 107 S. E. 609.

10. **Interest.**—It is a general rule that a promissory note, made payable without interest, bears interest at the legal rate after maturity; but, when the note is payable one day after date, interest is payable after demand for payment is made.—*Watts v. Mayes*, Mo., 232 S. W. 122.

11. **Memorandum.**—In a suit on a promissory note by a holder claiming it by purchase from the payee or a former holder, and which contains neither a general nor special indorsement by which title would be transferred, if the only evidence of what occurred between the payee or the former holder and the claimant is a memorandum of payment on the back of the note, the transaction must be held to be a payment and discharge, and not a purchase of the note.—*Purnell v. Gillespie*, Miss., 88 So. 637.

12. **Purpose of Signature.**—A signature placed upon the back of a promissory note will be presumed to have been placed there in response to an apparent call for it and as relevant to the purpose for which the note was executed, rather than for no purpose, or for a purpose which has already been accomplished.—*Pineland Realty Co. v. Clements*, La., 88 So. 818.

13. **Breach of Marriage Promise—Loss of Benefits.**—Plaintiff, suing for breach of marriage promise in addition to the loss of benefits which she would have enjoyed as wife of defendant, is entitled to recover her financial loss and for any humiliation and any impairment of health due to defendant's refusal to keep his promise to marry her.—*Rubin v. Klemmer*, R. I., 114 Atl. 131.

14. **Carriers of Goods—Rates.**—In a carrier's action against consignor for balance due for freight on an interstate shipment, defended on the ground that the carrier had agreed to collect the freight from others, to whom consignor sold the cars while in transit, it was proper to instruct that the tariffs were fixed by the Interstate Commerce Commission, and if through a mistake a lesser rate was collected the difference between such rate and the regular rate is still due and collectible from consignor.—*Chicago & E. R. Co. v. Lightfoot*, Mo., 232 S. W. 176.

15. **Commerce—"Foreign."**—Carloads of beef in course of transit from Buffalo to Montreal and thence to England, when passing over a terminal road and switching yard jointly operated by defendant railroads where the engine was derailed and plaintiff's intestate, a conductor in the service of one of the railroads, killed, held a shipment in foreign commerce, though covered by an interline switching waybill which was superseded by bills of lading issued by a third railroad when it received the shipment; the character of the shipment being determinable by continuity of movement combined with unity of plan.—*Cott v. Erie R. Co.*, N. Y., 131 N. E. 737.

16. **Interstate.**—Sale of motor trucks by order through agent of foreign corporation resident in state held interstate commerce.—*City Sales Agency v. Smith*, Miss., 88 So. 625.

17. **Contracts—Building Repairs.**—Agreement to make repairs on building in a "good and workmanlike manner" required contractor to do the work in the same manner that a person skilled in doing such work would do it, and in a manner generally considered skillful by those capable of judging such work in the community of the performance.—*Burnett & Bean v. Miller*, Ala., 88 So. 871.

18. **Divisible.**—A contract for the sale of real estate containing combined store and dwelling house and for the fixtures and stock was divisible into three parts, or at least the agreement as to the stock was severable from the other two subject-matters.—*Kahn v. Orenstein*, Del., 114 Atl. 165.

19. **Damages—Measure of.**—When, in the spring of the year, a person purchases a silo to be erected on his farm for use that summer or fall, and the agents for the company manufacturing the silo contract to furnish the purchaser an ensilage cutter at a stipulated price per ton for cutting the silage, but fail upon demand to furnish such cutter, the measure of damages is the difference between the value of the material or silage, the cost of putting it in the silo, and what the ensilage would have been worth at the usual feeding time for such ensilage during the winter following.—*Young v. Eaton*, Okla., 198 Pac. 857.

20. **Deeds—Consideration.**—Where an aged woman was partially paralyzed, so as to require a great deal of care, and had been sent from one relative to another, a promise by grantees to give her care and support for her natural life is a sufficient consideration to sustain a deed to a small farm, valued at \$1,500, though the grantees sustained a confidential relationship to her.—*Atkins v. Foreaker*, Del., 114 Atl. 173.

21. **Decent and Distribution—Value of Advancements.**—Property advanced should be valued as of the date at which the advancement was made, and when there is a parol gift of land, under which possession is taken, and a deed is executed at a later date, the advancement is to be treated as made, and accordingly valued, at the time of the parol gift.—*Ingram v. Ingram*, Va., 107 S. E. 653.

22. **Divorce**—*Res Judicata.*—The wife brought an action for divorce on the ground of cruel and inhuman treatment. The divorce was denied. After the lapse of a year since the wife left, the husband brought this action for divorce on the ground of desertion. She denied

the desertion, and counterclaimed for support, alleging that the husband's mistreatment had compelled her to leave him. It is held, following *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668, that the first action is not res judicata of the issues raised by the answer in the second action.—*Wulke v. Wulke*, Minn., 182 N. W. 349.

23. **Food—Deception.**—Agricultural Law, § 41, providing that no person selling any oleaginous substance not made from pure milk or cream shall use terms indicative of the process in the dairy in making or preparing butter, does not apply to the use of the words, "Churned for Table Use" on the label of oleomargarine or nut margarine where there was no intent to deceive and, in connection with the other statements on the label, no possibility of deception, in view of section 40, permitting the sale of oleomargarine, and section 51, stating that the object of that article is to prevent deception.—*People v. Peterson*, N. Y., 131 N. E. 748.

24. **Fraud—False Representations.**—In a suit for deceit and false representation as to the terms of a lease of a building, the party deceived and ousted by the owner before the expiration of the term for which it was leased, the measure of damages is the difference in value of the lease at the time of the ejection and the amount that would have been paid as rent for the remaining part of the term, such being the actual damages contemplated where the claim is only for general damages.—*Stone v. Pounds*, Miss., 88 So. 629.

25. **Highways—Negligence.**—A county was not liable for its negligence in construction and maintenance of a culvert on a county highway.—*Renner v. Buchanan County*, Iowa, 183 N. W. 320.

26. **Insurance—Excess Premium.**—Where a life insurance society discriminated against its policy holder, in violation of Insurance Law, § 39, by exacting a weekly premium of 50 cents, instead of the proper premium of 36 cents, so that there was in the hands of the society, or at least in those of its agent company, moneys properly belonging to insured, it is not beyond the power of the court to deem such moneys applied to payment of premium charges, in order to prevent a forfeiture.—*Fogg v. Morris Plan Ins. Soc.*, N. Y., 188 N. Y. S. 867.

27. **Insanity.**—A provision in an accident policy limiting recovery in case of suicide while insane is unenforceable, Rev. St. 1919, § 6150, applying, but the statute does not apply to case of suicide while sane; hence it was improper in an action on an accident policy, where it appeared that the insured took his own life, to direct a verdict for the beneficiary regardless of a provision limiting recovery in case of suicide whether sane or insane, but the question whether the insured was sane or insane at the time should have been submitted to the jury.—*Trembley v. Fidelity & Casualty Co.*, Mo., 232 S. W. 179.

28. **Liability of Insurer.**—If, following default in payment of premium, the insurer's agent accepted the premium conditionally until a health certificate upon which to base a reinstatement of the policy could be obtained in case insurer should demand it, and the insurer did demand certificate, and insured died before the policy was reinstated, there could be no recovery, but if the agent accepted the premium and informed insured that a Health certificate would be unnecessary, the insurer would be estopped to deny its liability, though insurer had instructed agent to obtain a certificate; the agent's neglect to so do being the negligence of the insurer.—*Hoyle v. Grange Life Assur. Ass'n*, Mich., 183 N. W. 50.

29. **Sufficiency of Proof.**—The rule that failure to make timely objection to the form or sufficiency of the notice or proof of loss amounts to a waiver of the requirements of the policy for such proof applies only where there has been some apparent attempt by insured to comply with the requirements as to the furnishing of such proof.—*State Ins. Co. v. Lock*, Iowa, 183 N. W. 311.

30. **Intoxicating Liquors—License Fee.**—A licensee to whom a liquor license is unlawfully issued by a city, cannot recover the license fee voluntarily paid, even though it was paid in

the belief that the license might lawfully issue.—*Courtright v. City of Detroit, Mich.*, 183 N. W. 346.

31.—**Use of Automobile.**—Under Acts Ex. Sess. 1917, p. 16, § 20, an automobile alleged to have been employed in the illegal transportation of liquor is subject to condemnation on evidence that it contained intoxicating liquor a short time previous to the seizure and within the period of limitations, though there is no evidence that any intoxicants were in the automobile at the time it was seized.—*Williams v. State, Ga.*, 107 S. E. 620.

32.—**Master and Servant.**—Arising Out of Employment.—Where the evidence showed that plaintiff's employment as fireman in a sawmill did not take him in the vicinity of the circular saw by which his hand was injured, that he was not performing services arising out of and incidental to his employment, and that the accident happened because of his neglect of his duties and his unnecessary exposure to a dangerous implement, he could not recover compensation under the Employers' Liability Act.—*Pierre v. Barringer, La.*, 88 So. 691.

33.—**Assault by Employee.**—Where a former employee, who had returned to collect pay due her, was assaulted by another employee, designated as a floor lady, who had authority to hire or discharge employees, who kept their time and paid them off, the master is liable for the assault, which grew out of the demand for pay.—*Birmingham Macaroni Co. v. Tadrick, Ala.*, 88 So. 858.

34.—**Course of Employment.**—Under Workmen's Compensation Act, § 2, cl. (d), providing for compensation for accidental injuries arising out of and in the course of the employment, an employee cannot recover for injuries by being struck by an automobile while riding his bicycle on his way home to lunch during the noon hour.—*Taylor v. Binswanger & Co., Va.*, 107 S. E. 649.

35.—**Dependent.**—Whether a surviving father is entitled to compensation by reason of the death of his minor son as the result of an injury received while in the discharge of a function for which he was employed depends, in part, upon the interpretation to be placed upon the language of the statute, which reads "actually dependent on the deceased employee to any extent for support." That language is here interpreted to include the case of a surviving father whose earnings are insufficient to enable him to discharge the legal obligation of maintaining his wife and children.—*Heinzelman v. Board of Com'rs, La.*, 88 So. 798.

36.—**Hazardous Employment.**—Band conductor held "employee" in "hazardous employment" within Compensation Law classification of employments having four "workmen" or "operatives."—*Europe v. Addison Amusements, N. Y.*, 131 N. E. 750.

37.—**"Independent Contractors."**—Members of contracting firm, pumping sand from well, held "independent contractors," and not "employees," within Compensation Act.—*Pryor v. Industrial Acc. Commission, Cal.*, 198 Pac. 1045.

38.—**Injuries Occurring Without State.**—The Workmen's Compensation Act is optional, and where the employer and employee, in a contract to be performed within and without the state, elect to become subject to the act, the relation under it is contractual, and an injury occurring outside the state while the employee is within the ambit of his employment is compensable, though the title restricts the right to compensation to cases provided for by the act and the act provides in sections 8 and 13 of part III for hearings of the committee of arbitration at the locality where the injury occurred and for presentation of copy of award to the circuit court of the county in which the accident occurred and for judgment without notice.—*Crane v. Leonard, Crossette & Riley, Mich.*, 183 N. W. 204.

39.—**Negligence.**—Where the superintendent directed plaintiff, a structural iron worker, to hold in position a measuring board and a stick at one end of an I-beam, while another worker undertook to straighten a flange at the other end of the beam by striking it with a sledge hammer, the fact that an injury resulted when

the latter missed the beam and struck the board cannot be deemed to show that the accident was the result of the negligence of a fellow servant, but the negligence must be deemed that of the superintendent.—*Simlick v. Stupp Bros. Bridge & Iron Co., Mo.*, 232 S. W. 241.

40.—**Mines and Minerals.**—Oil and Gas Lease.—Where the owner of land has incumbered it with a valid oil and gas lease, containing what is declared to be an absolute sale of the underlying oil and gas, he has nothing left to sell, so far as those minerals are concerned, save an interest contingent upon the failure of his lessee to exercise his rights and comply with his obligations; and one who buys the land, with actual as well as presumptive knowledge of such recorded lease, acquires no greater interest by his purchase, and can convey no more to one to whom he assumes to lease the land for oil and gas development.—*Standard Oil Co. v. Webb, La.*, 88 So. 808.

41.—**Municipal Corporations.**—Bond Issue.—The limitation of 5 per cent. of assessed valuation for creating of indebtedness in any one year, or 8 per cent. at any one time, does not apply to a vote authorizing the issue of bonds, but to their actual issuance, and hence the fact that electors of the city of Monroe voted sums in excess of the power to borrow would not prevent the city officials from borrowing up to the percentage limit under City Charter, §§ 133, 297.—*Kirby v. City of Monroe, Mich.*, 183 N. W. 216.

42.—**Notice of Injury.**—Under Gen. Laws 1909, c. 46, §15, requiring persons injured on a highway to give notice of the injury to the town or city, and providing that such notice shall be signed by the person injured, or some one in his behalf, a notice giving all the information contemplated by the statute, and purporting to be given by H. P., as next friend of E. P., and signed "H. P., as next friend of E. P. by his attorneys, S. & S.," was sufficient.—*Pepper v. Lee, R. I.*, 114 Atl. 10.

43.—**Pool Hall.**—The qualifications of one who has obtained a license to conduct a pool and billiard hall from the county judge, has been determined, and the mayor and council of a city or town have no power to by ordinance prescribe additional qualifications.—*Nicodemus v. State, Okla.*, 198 Pac. 847.

44.—**Snow on Sidewalk.**—Property owner's act in piling snow along sidewalk not artificial accumulation and storage, rendering walk dangerous from natural causes.—*Arning v. Druding, N. J.*, 114 Atl. 158.

45.—**Negligence.**—Degree of Care.—Operators of scenic railways or roly-coasters, such as are conducted in amusement parks, and take passengers thereon for hire, and being sources of peril by reason of their steep inclines, sharp curves, and great speed, owe to those who patronize them the duty to exercise the highest degree of care, skill, and diligence that it is reasonably possible to afford, keeping in mind the practical operation of the railway.—*Sand Springs Park v. Schrader, Okla.*, 198 Pac. 983.

46.—**Payment.**—Acceptance of Check.—The acceptance of a check by agreement of the parties has the effect of extinguishing the debt for which it was given, even though payment of the check is stopped.—*Cook & Bernheimer Co. v. Hagedorn, Ind.*, 131 N. E. 788.

47.—**Railroads.**—Fence Law.—Where a child strayed on a railroad track and was killed by a train, the fact that the railroad company had not fenced its road in accordance with Railroad Law, § 52, requiring fences to prevent live stock from going thereon, is no basis for a finding that the company was negligent; the statute not extending its protection to children.—*Di Caprio v. New York Cent. R. Co., N. Y.*, 131 N. E. 746.

48.—**Liability.**—As to persons riding on the rear end of an engine's tender, contrary to rules, on the unauthorized invitation of a brakeman, the railroad was under no obligation, and was not liable for personal injuries to them, when the engine collided with cars, where the engineer did not know of their presence and could not have anticipated it, as the negligent failure of the brakeman who invited them to ride to inform the engineer of their presence could not be charged to the railroad.—*Ellsmore v. Director General of Railroads, N. H.*, 114 Atl. 25.

49.—**Liability for Fire.**—A railroad will not be held liable for a fire loss upon a mere possibility that the fire, which started in a gin-house 70 feet away from the track, might have been started by sparks from a locomotive which passed 20 or 30 minutes before the fire was discovered, while a moderate breeze was blowing from the track toward the house, where there is no direct evidence of the origin of the fire, and the railroad has proven affirmatively that the spark-arresting apparatus was efficient and that there was no negligence in the handling of the locomotive.—*Laurel Hill Gin & Mfg. Co. v. Yazoo & M. V. R. Co., La.*, 88 So. 801.

50.—**Punitive Damages.**—Under the provisions of the Federal Control Act of August 29, 1916, and Act March 21, 1918, punitive damages may be recovered in a suit for personal injury where the same could be recovered before the federal control was assumed, the said acts providing that while under federal control the carriers shall be subject to all laws and liabilities as common carriers whether arising under state or federal laws, or at common law, except so far as may be inconsistent with the provisions of said act. In all other respects it was the intent of Congress to leave the laws of the states in full force.—*Davis v. Elzey, Miss.*, 88 So. 630.

51.—**Sales.**—**Credit Investigation.**—Where, after their traveling salesman took an order, plaintiffs at their home office advised defendants it would be necessary that they hold the order pending completion of credit investigation, and that as soon as they received the information they would advise defendants as to accepting the order, such letter constituted an acceptance on the sole condition that defendants' credit standing prove satisfactory, and, nothing unsatisfactory in such respect appearing, plaintiffs had no right or authority, 25 days thereafter, to change or alter the contract by notifying defendants as to acceptance and shipment of part of the goods and declining to ship the rest because withdrawn from sale during the credit investigation.—*Glimer Bros. Co., Inc. v. Wilder Mercantile Co., Ala.*, 88 So. 854.

52.—**Specific Performance.**—**Remedy Discretionary.**—The enforcement of an option agreement for sale of land rests in the sound discretion of the court, and permitting the plaintiff to show that the land in question was in the very heart of a district which the plaintiff was purchasing and developing was competent to show that money compensation for the breach was inadequate, and that the performance of the option was the only adequate relief, and to show a reason for the defendants' breach.—*Watkins v. Minor, Mich.*, 183 N. W. 186.

53.—**Taxation.**—**Liquors in Warehouses.**—Under Const. § 181, authorizing the imposition of license, occupation, and excise taxes by general law, Acts 1920, c. 13, imposing a license tax per gallon on every person engaged in the business of manufacturing, owning, storing and removing distilled spirits from bonded warehouses, payable on such removal, is unconstitutional, being not an occupation or excise tax, but a tax on the act of removal from bonded warehouses for the purpose of making some one of the only uses of which the property is capable, and therefore a tax on the property itself.—*Craig v. E. H. Taylor, Jr., & Sons, Ky.*, 232 S. W. 395.

54.—**Public Charity.**—Property in which a public charity has a remainder contingent on the life tenant, a girl 20 years old, leaving no issue, or any such issue dying before majority without surviving issue, is not exempt under Const. § 170 and Ky. St. § 4026, as property being used in or devoted exclusively to public charity.—*Moorman's Ex'r and Trustee v. Board of Sup'rs, Ky.*, 232 S. W. 379.

55.—**Void Statute.**—Chapter 75, Laws 1908, providing that stocks of goods, wares, and merchandise offered for sale by any firm, person, or corporation commencing business after the 1st day of February of the current year shall be assessed for ad valorem taxes, on given basis of the tax for a whole year, fixing the dates and proportions at quarterly periods, is unconstitutional, because in conflict with section 112 of the state Constitution, providing that taxation shall be equal and uniform throughout the state, and shall be assessed under general laws

and by uniform rules according to its true value; the general law fixing the 1st day of February in each year as the date for assessing and valuing other property for ad valorem taxation.—*Reed Bros., Inc. v. Board of Sup'rs of Lee County, Miss.*, 88 So. 503.

56.—**Telegraphs and Telephones.**—**Federal Control.**—Although the joint resolution of Congress of July 16, 1918, empowered the President to take control of all telegraph systems, and the presidential proclamation authorized the Postmaster General to exercise such control through the existing personnel, an action on a cause arising during governmental control was properly brought against the telegraph company; the contract between the company and Postmaster General obligating the latter to save the company harmless from all judgments and decrees by reason of any cause of action arising out of federal control, for, in any event, the judgment should be paid by the Postmaster General.—*Poston v. Western Union Telegraph Co., S. C.*, 107 S. E. 516.

57.—**Negligence.**—Negligence could not be predicated on the act of a telephone employee on a highway in throwing a glass insulator to another employee on a telephone pole, frightening a horse within a few feet of him, where nothing unusual in the manner of the throwing appears, and it does not appear that he knew the horse was so near, as the act was not such as would naturally be calculated to frighten a gentle horse.—*United Telephone Co. v. Barva, Ind.*, 131 N. E. 794.

58.—**Vendor and Purchaser.**—**Shortage in Acreage.**—The buyer of land cannot recover for a shortage in acreage in the absence of fraud, unless he has taken a warranty as to the acreage.—*Lantz v. Howell, N. C.*, 107 S. E. 437.

59.—**Wills.**—**Forfeiture of Gift.**—Where a testator gave the rents, issues, and profits of his property to his wife and son equally, and provided that if the wife predeceased the son the property should go to the son absolutely, the killing of the wife by the son was not within Code Supp. 1913 § 3386, providing that no person feloniously taking the life of another shall inherit from such person or take anything from him by devise or legacy.—*In re Emerson's Estate, Iowa*, 18 N. W. 327.

60.—**Legacies.**—Where legacies are given generally followed by a gift of the residue of the estate, real, personal and mixed, the legacies are charged upon the residuary real estate as well as the personal estate, where the latter at the date of the will is insufficient to pay the debts and legacies of the testator, and in such cases the real estate may be reached to pay the legacies, or so much thereof as the personal estate is insufficient to pay.—*Walters v. Young, Del.*, 114 Atl. 164.

61.—**Life Estate.**—Devise to wife to "hold," "control," and "use," for her life gives only a life estate; and the implication by the gift of the remainder that the widow might consume or dispose of a part of the estate refers to the personal property susceptible to destruction by use.—*Rice v. Fields, Ky.*, 232 S. W. 385.

62.—**Remainder.**—Remainder held not to vest upon renunciation by widow given a life estate so as to allow acceleration.—*Rose v. Rose, Miss.*, 88 So. 513.

63.—**Remainder.**—Under a will devising to testatrix's grandsons and their survivor and the heirs of such survivor a certain farm on trust, that such trustees should allow granddaughters to have the use of certain cows, also to pay over to them the rents and profits of the farm during their joint natural lives, on death of either of such granddaughters, the portion of the one so dying to go to her representatives in fee simple equally, share and share alike, the trustees to pay over and transfer accordingly, the trustees had no duty to perform or discretion in reference to the remainders, and the representatives of the granddaughters took legal estates to which the rule in *Shelley's Case* did not apply.—*Beggs v. Erb, Md.*, 113 Atl. 881.

64.—**Revocation.**—Forcibly preventing testator from changing will held not such a change in conditions or circumstances as to amount to a revocation by implication.—*Minor v. Russell, Miss.*, 88 So. 633.

Central Law Journal.

St. Louis, Mo., October 14, 1921.

THE RELIEF OF FEDERAL COURTS AND THE PAY OF FEDERAL JUDGES.

The congestion which exists in many of the courts of the United States, has prompted Attorney-General Daugherty to recommend to the President and to Congress, the adoption of a law creating eighteen Federal judges-at-large, two for each judicial circuit. They are to have all of the powers of district judges, except the appointment of clerks and other officers. (The resident judges will continue to exercise that authority.) They are to be appointed for life, but the provision of the new bill is that when they die or resign, no successors are to be appointed, unless Congress shall so declare. These judges-at-large, are to be assigned by the senior circuit judge of the circuit, to any district in the circuit, where their services are needed, and by the Chief Justice to any district in any other circuit. The bill also provides for an annual meeting of the Chief Justice and the Senior Circuit Judges from the nine circuits, who with the Attorney-General shall consider the condition of business in the respective districts, with a view to massing the entire judicial force of the United States in those districts where business requires relief. This is but a part of the plan for the reorganization of the judicial system of the United States. A lawyers' committee consisting of one chairman from each State and one or more members from each congressional district has been actively engaged for some time in urging the necessity of the passage of a bill in Congress to relieve the present condition.

There can be no doubt that the adoption of the Eighteenth Amendment and the passage of the Volstead law has greatly added to the burden resting upon the Federal courts. There is a natural increase in civil

business due to the growth of population, the ending of the war, and the development of the country, which will prevent any marked decrease in court business unless some form of relief is promptly provided. If the Federal courts could be relieved of the necessity of trying the unimportant cases under the Volstead law, it is believed that the congestion of criminal business would soon be overcome. Too much time of the district judges is consumed in the trial of prohibition cases. The Eighteenth Amendment was designed to prohibit the manufacture, sale and transportation of liquors. The Volstead law is far more sweeping in its terms and covers practically every liquor case. The result is that thousands of cases which would be tried in the State tribunals—but for the provisions of the Volstead law—are brought into the Federal courts, taking up the time of the courts which should be devoted to business of greater importance to the people. It has been suggested that the Volstead Act could be amended *so as to restrict prosecutions under it in the Federal courts to the class of cases covered by the Eighteenth Amendment only*, and it is thought that the congestion of business would thereby be materially relieved.

Investigation of the alarming situation in the Federal courts reveals that on June 30th, 1921, there were 141,000 cases pending, as compared with 118,744 cases at the end of the previous fiscal year. This condition is not entirely the result of the passage of the prohibition laws, but they have to a greater extent than any other, impeded the ordinary progress of other business in the courts.

Another important feature of the movement to improve the administration of justice in the Federal courts, deals with the pay of the judges who find it impossible to live comfortably, and in keeping with the dignity of the office, on the salary now received. The Chief Justice of the United States, who holds the highest judicial office in the world, receives \$15,000 a year. The

highest judicial officer in England receives \$50,000 a year, plus allowances and a state-ly official residence in the Palace of Westminster. Associate Justices of the United States Supreme Court receive \$14,500 a year. Circuit Judges \$8,500 and District Judges, regardless of location, \$7,500. The judge of a trial court in England, receives \$25,000, holds office for life and receives a pension of two-thirds of his salary when retired on account of age or disability. A Justice of the Peace in New York receives \$10,000 a year and a trial judge sitting in New York City, receives \$17,500, or two and a third times as much as the Federal judge of the same district.

America, the richest country on earth, prides herself on her record for justice and fairness. England, overwhelmingly in debt as a result of the great world war, still finds a sane public policy demands fair and just compensation to her judiciary, and pays her judges many times the amount which we pay. The American bar should give prompt, serious, thoughtful consideration to the importance of urging Congress to remedy this condition.

MAX ISAAC.

NOTES OF IMPORTANT DECISIONS

THE OBLIGATION AND ELIGIBILITY OF WOMEN TO SERVE AS JURORS UNDER THE NINETEENTH AMENDMENT.—The Supreme Court of Massachusetts has just replied to two questions propounded by the legislature of that state, the answers to which will be interesting to lawyers in every state. Opinion of Justices 130 N. E. 685. The two questions propounded are these, namely:

1. Under the Constitution and laws of Massachusetts and the Constitution of the United States are women liable to jury duty?
2. If the first question is answered in the negative, has the General Court of Massachusetts constitutional power to enact legislation so that women may be made liable to jury duty?

The court answered the first question in the negative and the second in the affirmative.

In regard to the first question the Court said:

"The words of G. L., chap. 234, sec. 1, to the effect that 'a person qualified to vote for representatives to the General Court shall be liable to serve as a juror,' are broad enough as matter of mere verbal analysis, in connection with G. L., chap. 51, sec. 1, conferring such right to vote upon women, to include women as well as men. Those words, however, like the words of every statute, are not to be interpreted in their simple literal meaning, but in connection with the history of the times and the entire system of which the statute in question forms a part, in the light of the constitution, of the common law and of previous legislation upon the same subject. The provisions of law prescribing the qualifications of those subject to jury service have been in almost the same essential words since the adoption of the constitution. No sound ground for the contention that women could be jurors existed until after the adoption of the Nineteenth Amendment to the Federal Constitution. It cannot be thought that the General Court, by re-enacting in G. L., chap. 234, sec. 1, the description of those liable to be drawn as jurors, in words previously used and without change, intended to include women."

The second question gave the court more difficulty than did the first because of many declarations in previous decisions of the Court that the "trial by jury" preserved by the State Constitution meant a trial by "twelve good men and true," and especially the declaration of Gray J. in *Robinson's Case* (131 Mass. 376, 41 Am. Rep. 239), that women could not form a part of a common law jury or "take any part in the administration of justice either as judges or jurors with the single exception of a jury of matrons upon a suggestion of pregnancy." In holding that women are eligible under the Nineteenth Amendment to serve as jurors if the legislature so provided the Court said:

"It is a constituent element of the trial by jury preserved by the constitution that jurors be selected from the body of the electorate. The enlargement of the body of the electorate, before the adoption of the Nineteenth Amendment, so as to include substantially universal manhood suffrage, has not been treated as violating the constitutional features of trial by jury. That has been the interpretation of practical administration in the courts and the course of statutory enactments. When the suffrage has been extended by amendments to the constitution there has followed a like enlargement of the class of citizens liable to jury service. It is common knowledge that many men have served as jurors not possessing the qualifications of electors under the Constitution of 1780. In other respects qualifications of jurors required by common law in 1780 have been modified (see *Commonwealth v. Wong Chung*, 186 Mass., 231, 71 N. E. 292, 1 Ann. Cas. 193.)

"No reason based on the constitution is perceived why women, when they become qualified to vote under the Nineteenth Amendment to the Federal Constitution, should not also be eligible to jury service, if the General Court so determines."

THE COMMON LAW.*

The Common Law is like a rich seam of precious metal lying deep below the surface of the life of Britain, and this rich seam outcrops again in the North American Continent, and has there been worked and assayed and refined and applied by diligent and skillful toilers in nearly every province of Canada and nearly every state of the Union, for the progress and development of mankind. It has overcome distance and withstood the assaults of time. I do not forget that in the early days of the American Republic there was a movement to repudiate the Common Law on the ground that it came from England. It would be as reasonable for Americans to repudiate the game of golf because it comes from Scotland; instead of which the authors of your independence lost no time in making a tee-shot into Boston harbor, and naming one of your early battlefields Bunker Hill. And, indeed, the Common Law, as you and I understand it, is not some British institution which has been imposed or foisted upon Americans, it is the common possession of both countries, which has been preserved and developed by the energies and the intelligence of each; and certainly no nation owes more to its lawyers than does this great Republic. When the French Revolutionists killed the famous scientist Laveisier they shouted, "The Republic has no need of chemists," but the founders of the American Republic made no such mistake about lawyers. Of the 56 signatories to your Declaration of Independence no less than 25 were lawyers; while of the 55 members of the Federal Constitutional Convention 31 were lawyers. It will be true, I think, to say that in these great acts of constructive statesmanship, lawyers played as large a part in America in the Eighteenth Century as they had done in England in the Seventeenth. And now that the light of history shines high in the

heavens and has dispelled the mists of prejudice and passion, let us admit that in both cases it was the devotion of lawyers to constitutional liberty which laid broad and deep the foundations of the two governments.

We must not forget that the Common Law at the end of the Eighteenth Century was as yet undeveloped in many of its modern applications. Save for the luminous and comprehensive Treatise of William Blackstone there was hardly a law book which could be described as attractive reading. Coke on Littleton I have always regarded as a repulsive authority, and the Eighteenth Century Digests were presumably so called because their contents were quite indigestible. Coke, indeed, claimed that the Common Law was "the perfection of reason;" but a system which punished witchcraft by fearful penalties; which ascertained whether a man was mute by malice or by visitation of God, by piling weights upon his body heavier than he could bear to see whether he would cry out, and which chiefly concerned itself with the incidents of feudal tenures and the niceties of written pleadings, may well have seemed unsuited to the needs of the vigorous and progressive Republic of America. All honor, then, to the lawyers of this Nation who realized that there was precious gold hidden beneath this dross and who extracted from the ancient Common Law so many of those modern applications which have made it the basis of the jurisprudence of the English speaking world.

It is instructive and interesting to observe how far during the last 150 years lawyers in the two countries, building independently upon the same foundation of the common law have erected a corresponding structure. The world in which the common law had its roots, knew nothing of modern methods of transportation or communication, and it remained to be seen whether the ramifications of banking and insurance and every form of business could be served by new applications of ancient

*Address by Sir John Simon of London, before the American Bar Association, August 31, 1921.

principles. It is a wonderful proof of the truly scientific character of law that alike in the old world and in the new, judges and lawyers trained in the same school should have the same solution for the same difficulties. The works of Joseph Sterey who, knowing the bearings of every case, navigated from headland to headland, and the judgment of John Marshall who was like a mariner with a compass by which he could find his way across uncharted seas so as to proceed straight across to the desired and destined haven, may almost be said to be "familiar as household words" to a trained English lawyer. It is one of my earliest recollections of the practice of the law how the English Court of Appeals was convinced by reference to a chapter in Mr. Justice Holmes' profound and masterly analysis of the Common Law, that a previous decision of the English High Court was wrong, and that the true principle was to be found expounded in his luminous treatise. And, just before I left England, I was arguing before the House of Lords the question whether, what we call "bonus shares," and you call "stock dividends," were liable to income tax, and I had the satisfaction both of winning my case and of establishing the true principle of law largely by means of citing a recent judgment of Mr. Justice Pitney in the Supreme Court of the United States.

Equally remarkable is the development in the two countries, side by side, of that branch of the law which deals with personal rights. An interesting book might be written by an English lawyer and an American lawyer, jointly, comparing and contrasting provisions for securing the rights of married women, for protecting children, for enabling the insolvent debtor, who has done his best but is overwhelmed by misfortune, to make a fresh start instead of languishing in a debtor's prison, for admitting parties in civil and criminal cases as witnesses in their own behalf, and for removing disabilities of sex. We have at length followed the American lead in throwing open

the profession of the law to women, and the first woman barrister will shortly be called at the Inns of Court. But if I may judge from the aspect of this audience, it would appear that women lawyers, like others of the sex, having received acknowledgement of their rights, are not always concerned to take full advantage of them.

I think it will be found, if a comparison were made, that main differences between the private law of England and America are more in the region of practice and procedure than in the realm of substantive rights. Nearly fifty years ago we swept away the distinction between law and equity, and it may fairly be said that the existing system in England is one which does not deprive a man of his rights because he has come to the wrong court. The old system of pleading has been abolished, with the result that more simplicity has been introduced into the preliminaries of trial, though with a sacrifice of precision which many of the best English lawyers realize to be a misfortune. So far as England is concerned, the challenge of a juryman is practically unknown, and we have not found it necessary to inquire into the antecedent knowledge of the jury, but have thought it sufficient to rely upon their sense of responsibility as citizens. The use of juries, however, has much decreased of late, and though for my part I think twelve jurymen much the best tribunal to give a competent decision on insoluble problems, such as the amount of damages which should be given for a broken leg, or rendered to a lady who has lost her husband in a railway accident, and married again, there is an undoubted tendency in the old country to dispense with their assistance in cases which formerly would have required it. But I think the main claim which an English lawyer would seek to make in favor of his own procedure is on the score of speedy trial. Justice delayed is justice denied, and though our circuit system sometimes leaves an accused person in custody for as much as two or three months before his case is heard, the

trial itself is carried through without other delays, the opportunities for appeal are circumscribed, we have abolished much of the technicality which formerly offered a way of escape for the guilty, and the carrying out of the sentence promptly follows conviction. In civil cases great efforts have been made to avoid delay and it is possible in our commercial courts to have a case tried within a few weeks or at most a few months of the issue of the writ.

But these differences are all differences of detail in which each country may have something to teach and something to learn. The great fact is, that English law and American law, derived from the same origin, are pursuing the same goal, and in our intercourse with one another we are realizing more completely the solidarity of the friendship of the English-speaking world.

What are the unseen but unshakable foundations upon which Anglo-American friendship rests? It is a friendship the peaceful continuance of which over a full century of time we were preparing to celebrate in that year of destiny 1914. It is a friendship which since that date has been cemented and consecrated in the valley of the shadow of death; by heroic suffering and triumphant effort in a common cause. In Flanders and in France British and American dust lies mingled. Both nations share, in the immortal words of Abraham Lincoln, in the solemn pride that is theirs to have laid so costly a sacrifice upon the altar of freedom. These young lives, so boldly offered, and so bravely surrendered, are at once a token and a pledge. They are a token of that unity of spirit pervading alike this young nation and the old land from whose loins she sprang, which no width of ocean could divide and no memory of ancient feud could destroy. And they are a pledge for the future of Anglo-American friendship and thereby for the peace of the world. Love of Liberty, a joint Literature, the same Language, and the Common Law—these are the four Evangelists of the Gospel of Anglo-American friendship;

these are the Big Four who can best guarantee that hands will be stretched across the sea and grasped in a common resolve to save those for whom this stupendous sacrifice was made from a renewal of strife. And among these influences which make for the reconciliation of mankind and the saving of humanity from the unspeakable horrors of armed conflict, Law, in its highest and broadest sense, is one of the chief. It is the instrument of Justice; it is the handmaid of Order; it is the guarantor of Individual Right; it is the arbiter of Dispute and the Reconciler of Difference; it is the Cement which binds together the fabric of human institution; it is the standard which society erects to guide those that are tempted to recall to the true path those who are led astray and to symbolize the fact that each one of us can not live for himself but must serve and work for the common good. Let us, then boldly proclaim our pride in this great profession; our resolve to bring no dishonor upon its escutcheon and our belief in the value of the contribution which it may make to the future advancement of the world.

SIR JOHN SIMON.

THE BRITISH COURTS — RECENT CASES OF IMPORTANCE.

As our readers will be aware, the scarcity of housing consequent on the war has brought into play a series of special statutes designed to prevent ejection of tenants, or raising of rents beyond certain limits. In *Barton and Mitchell v. Fincham*,¹ the tenant agreed in consideration of the payment of £20 to give notice and to go out of possession at Michaelmas, 1920. The money was paid, and Michaelmas came, but the tenant refused to go out. There was no evidence that the landlord was prejudiced by the receipt of notice to quit. The landlord claimed possession. Sec. 5 of the Act provides that "No order or judgment for

(1) 151 L. T. J. 129.

the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given" except in certain cases therein mentioned. The above facts did not constitute any of the cases mentioned therein, and the Court of Appeal held that the section must be strictly construed, and the landlord was therefore not entitled to possession. A point of some difficulty in the case was occasioned by sec. 15 (2), which provides that "Any person retaining possession as aforesaid shall not as a condition of giving up possession, ask or receive the payment of any sum, or the giving of any other consideration by any person other than the landlord. * * *" And it was argued for the landlord that the latter words indicated that the Legislature contemplated agreements between landlord and tenant for valuable consideration in reference to the giving up of possession. This contention found favor with Mr. Justice McCardie in the Divisional Court, but failed in the Court of Appeal, Lord Justice Bankes observing that it seemed obviously necessary to exclude a landlord who may be willing to pay something to a tenant for vacant possession from the penalty laid down by the sub-section, and that it was for this reason only that any reference was made to the landlord in that sub-section.

The rights of a person who has initiated a play and suggested ideas to others who have carried out and completed a work in which the suggestions have, up to a certain point, been embodied, in this case a musical drama, have been the subject of an interesting decision in the case of *Tate v. Thomas*,² before Mr. Justice Eve. In that case an actor and producer of plays, who was not a party to the action, having conceived the name and some of the scenes of a musical play dealing with the war, had commissioned the three plaintiffs to write the words and music under an agreement which, in effect, gave him the stage-performing rights conditionally on his making payments to

the plaintiffs, as being the authors and composer, of weekly royalties. Having obtained this agreement and arranged for the production of the piece at the Oxford Music Hall, he applied for financial assistance to the defendant theatrical agency, and under various agreements and mortgages the agency became entitled to all his rights, which he assigned to them as being the beneficial owner of the copyright in the play. The play was produced on the stage and was a success. Later the agency licensed him, as agent for the first defendant, to produce a film of the scenes, and the plaintiffs, on discovering this, brought an action for infringement of their copyright. The main defense was that the person who had initiated the title, suggested situations, scenes, characters, and supplied certain lines in a play of this description, was as its sole author entitled to the copyright in it, or, if not, that the play was his collective joint work with the three who clothed his outline with words and music. Sole authorship being out of the question, the criterion enunciated by the Court of Appeal, reversing Mr. Justice Phillimore in *Tate v. Fulbrook*,³ was applied, and it was held that the person who supplies the "skeleton" of a play of this nature is not the individual entitled to the copyright in the finished production, but he who clothes the skeleton with words and music resulting in a book that can be published. The plaintiffs, who had been described over and over again as the authors and composer, in some instances at the request of the defendant company, were under the Copyright Act 1911, *prima facie* entitled to the copyright, and the defendants had not rebutted that presumption by producing evidence that various "accessories" born of the fertile imagination of another were embodied in the musical play as ultimately sent forth.

A new conveyancing bill is before Parliament and one section of it dealing with the execution of deeds by corporations may be of practical interest to readers of the CEN-

(2) 151 L. T. J. 94.

(3) 98 L. T. Rep. 706 (1908), 1 K. B. 821.

TRAL LAW JOURNAL. Persons who deal with companies or corporations are affected with notice of their regulations, which usually consist of a memorandum and articles of association. This being so, in the case of deeds executed by a company, it is a common form of requisition that evidence must be furnished that the formalities prescribed for the affixing of the common seal to a deed have been complied with. The case of *D'Arcy v. Tamar, Kit Hill and Callington Railway Company*⁴ shows that, unless the requisite formalities have been complied with, a person dealing with the company runs considerable risk. Presumably the court would be reluctant to allow a *bona fide* purchaser to be defeated by a slight irregularity, such as the omission of the secretary to attest the affixing of the seal where it had been affixed in the presence of two directors. And even if the deed were inoperative as a valid disposition of the legal estate, it might operate as an agreement (see *Re Fireproof Doors, Limited, Umney v. The Company*).⁵ There certain debentures were sealed in the presence of one director and the secretary only, though the articles of association required the presence of two directors and the secretary, and it was held that even if the debentures were irregular, they were sufficient evidence of an agreement, so that equitable debentures were created (and see *Biggerstaffe v. Rowatt's Wharf, Limited*).⁶ If the new Law of Property Bill passes, the difficulty will be overcome, as it contains a section to the effect that a corporation aggregate may execute a deed by having their seal affixed thereto in the presence of, and attested by, their clerk, secretary, or other permanent officer, or his deputy, and a member of the board of directors, or other governing body of corporations; and that where the seal of the corporation is affixed to a deed, then, if the requirements of that section appear to have been complied with, the

deed (if executed after the commencement of the Act) shall in favor of a purchaser been deemed to have been executed in the presence of the proper persons, and to have taken effect accordingly.

The judgment of the Privy Council in *Gerrard v. Crowe*⁷ has been cited as an illustration that the maxim, *sic utere tuo ut alienum non laedas*, may not always apply. There apparently are circumstances under which a person may so use his own land as to cause injury to that of another. Thus, in the case just mentioned, an owner of land in New Zealand, adjoining a river, erected an embankment on his land, with the object of protecting it from floods. The consequence was that the water flowing over the land on the opposite bank, in times of heavy floods, was thereby increased. The owner of such land brought an action against the person who erected the embankment, claiming an injunction and damages. At the trial, judgment was given to the plaintiff, but that judgment was reversed by the Court of Appeal, and a further appeal to the Judicial Committee also failed. The judgment of their Lordships was delivered by Viscount Cave. He reviewed the authorities, which showed that the rights of an owner of land, on or near a river, to protect himself from floods, is well settled; but, of course, he must not obstruct the alveus of the river, as pointed out by Viscount Cave. There are no doubt *dicta* in some of the cases to the contrary, as in *Rex v. Trafford*,⁸ where Lord Tenteden, C. J., said: "It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another." But that judgment was reversed in the Exchequer Chambers and could not be relied upon as a safe authority. His Lordship thought that possibly the dicta referred to meant no more than this, that a land owner, in protecting his land from the common enemy, must use reasonably, care and

(4) L. Rep. 2 Ex. 158.

(5) 114 L. T. Rep. 994.

(6) 74 L. T. Rep. 473 (1896); 2 Ch. 93.

(7) (1921) A. C., 395.

(8) 1 B. & Ad. 874, 887.

skill, and must not do more than is reasonably necessary for that purpose.

In *Dewes v. Fitch*,⁹ a solicitor entered into a covenant with his managing clerk, who had been in his service for many years, that he should serve him in that capacity for three years, and that he should not directly or indirectly "be engaged or manage or concerned in the office, profession, or business of a solicitor within a radius of seven miles of the Town Hall of Tamworth," except in respect of a named business. There was no limit as to time for the operation of the covenant. The defendant, after leaving the employer's service, committed a breach of the covenant. The Court of Appeal held that the covenant was not rendered unreasonable by the fact that the restraint operated for the whole life of the covenantor, and they also affirmed Mr. Justice Eve, who had held that the covenant was reasonable in the interests of the parties, and of the public, and granted an injunction to enforce it. The defendant in that case left the plaintiff's service equipped with two types of property—professional secrets, names of clients, and generally what Lord Shaw calls in *Mason v. Provident Clothing Supply Company*,¹⁰ "objective" skill and knowledge. "These" he says, "may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents an employer from restraining a transfer of them against his will." The other type of property was the skill and knowledge which he had acquired; these are "subjective" and, although acquired in the employer's service, belong to the employee. "No public interest," says Mr. Justice Eve in *Dewes v. Fitch*, "compels the rendering of these dormant or sterile or unavailing."

In *Bowler v. Lovegrove*,¹¹ a firm of auctioneers and estate agents endeavored to apply this principle in their own favor in respect of a covenant between themselves and their canvassing and negotiating clerk, who

had agreed not to carry on the business of auctioneer and estate agent within the borough of Portsmouth for one year after the termination of his employment with them. The defendant, almost immediately after leaving their service, set up in business as an estate agent within the prohibited area, and the plaintiff sought to restrain him. Mr. Justice P. O. Lawrence held that the defendant had not broken the covenant, because it related to the combined business of "auctioneer and estate agent," and there was no evidence that the defendant had even acted as auctioneer, although he described himself as "C. Lovegrove, A. A. I. (Associate of the Auctioneers' Institute)". The judge admitted that this was a narrow construction of the covenant, but he thought it was one which ought to be construed narrowly. This really put an end to the case, but as an attempt had been made to bring it within the limits of a reasonable restraint by an employer, the judge proceeded to deal with it as if a breach had been committed.

In *Dewes v. Fitch*, Lord Justice Warrington referred to the plaintiff's right to guard against his trade connection being "unduly invaded" by the defendant, because of the special opportunities which he enjoyed for that invasion, whilst acting as managing clerk to his employer in the work of a solicitor. Does a clerk to an estate agent enjoy similar opportunities? Mr. Justice P. O. Lawrence says decidedly that he does not. Customers of an estate agent are not recurring customers. They probably only have one business transaction, and they put their names on the books of several estate agents in the district so as to ensure the business going through quickly. Estate agents get their customers largely by searching the advertisements in local newspapers, and there is no good-will so far as customers are concerned, as there is in the case of a solicitor's clients. "An estate agent," said Mr. Justice P. O. Lawrence, "in setting up business depends upon his own skill and industry in obtaining customers and

(9) (1920) 2 Ch. 159.

(10) 109 L. T. Rep. 449; (1913) A. C. 724.

(11) (1921), 151 L. T. J. 146.

not on making an improper use of the knowledge which he has previously obtained." The only restraint which could be used in such a case would be a covenant which prohibited the clerk from canvassing any person who had put any business exclusively in the plaintiff's hands at the time he left his employment.

DONALD MACKAY.

Glasgow, Scotland.

ARBITRATION LAW—APPLICATION.

BERKOVITZ v. ARBIB & HOULBERG.

Court of Appeals of New York. March 1, 1921.

130 N. E. 288.

Changes in the form of remedies are applicable to proceedings thereafter instituted for the redress of wrongs already done, and are retrospective if viewed in relation to wrongs, and prospective when viewed in relation to the means of reparation, and Arbitration Law is applicable though enacted after the contract was made, but before the remedy was invoked.

Application by Herman Berkovitz and another for an order under the Arbitration Law directing that the arbitration provided for in a written contract with Arbib & Houlberg, Incorporated, should proceed. From an order denying the motion and refusing to appoint an arbitrator, the applicants appealed to the Appellate Division, which affirmed the order (193 App. Div. 423, 183 N. Y. Supp. 304), and the applicants appeal by permission of the Court of Appeals. Also an action by the Spiritusfabriek Astra of Amsterdam, Holland, against the Sugar Products Company, in which an order of the Special Term denying defendant's motion for a stay of proceeding was affirmed by the Appellate Division (184 N. Y. Supp. 952), and defendant by permission of the Appellate Division, appeals. In the first case, order of Appellate Division and of Special Term reversed, and the proceeding remitted to the Special Term for the appointment of an arbitrator; and, in the second case, order affirmed, with costs, and propounded questions as to validity and application of Arbitration Law answered.

Upon the appeal in the action of Spiritusfabriek, etc., v. Sugar Products Co., the following questions were certified:

"(1) Is the Arbitration Law applicable to contracts made prior to its enactment?"

"(2) Is the defendant in an action brought prior to the enactment of the Arbitration Law

on a written contract made prior to the enactment of the Arbitration Law, containing a provision for arbitration, entitled to a stay of the trial of the action pending arbitration pursuant to article 2, § 5, of the Arbitration Law?"

"(3) Is the Arbitration Law applicable to a written contract containing a provision for arbitration, made prior to the enactment of the law and made and to be performed in jurisdictions where arbitration was enforceable when the contract was made and to be performed?"

"(4) Is the sixth defense alleged in paragraphs 25 to 35 of the amended answer in this action, if proved, a bar to the maintenance of this action under the Arbitration Law?"

"(5) Is the Arbitration Law applicable to a written contract containing a provision for arbitration without the state of New York?"

"(6) Does the Arbitration Law contravene article 1 of section 10 of the Constitution of the United States, prohibiting laws impairing the obligations of contracts?"

"(7) Does the Arbitration Law contravene the Seventh Amendment to the Constitution of the United States, or does it contravene section 2 of article 1 of the Constitution of the state of New York, by depriving a party of the right of trial by jury?"

"(8) Does the Arbitration Law contravene section 1 of article 6 of the Constitution of the state of New York, providing that 'the Supreme Court is continued with general jurisdiction in law and equity?'"

CARDOZO, J. The validity of the Arbitration Law (L. 1920, c. 275; Consol. Laws, c. 72), and its application to existing contracts and pending actions, are the questions here involved.

In one case (Matter of Berkovitz & Spiegel), a contract for the sale of goatskins was made in November, 1919. It provides that the skins shall "be the usual quality of their kind, and claims in regard thereto shall not invalidate this contract, but shall be settled amicably or by arbitration in the usual manner." The skins, which came from India, arrived in New York on April 12, 1920. The Arbitration Law took effect on April 19 of the same year. The buyer, after inspection of the goods, gave notice of rejection. The seller demanded arbitration, and moved, under the statute, for the appointment of an arbitrator. The appointment was refused at Special Term and at the Appellate Division, the latter court holding that the Arbitration Law did not apply to pre-existing contracts.

In the second case (Spiritusfabriek Astra v. Sugar Products Co.), a contract for the sale of molasses was made in July, 1914. One of its provisions is:

"The regular arbitration and force majeure clauses are to form part of this contract. * * * It is agreed in the event of an arbitration being called, it is to sit in London."

The plaintiff, the buyer, brought action against the seller in July, 1916. The defendant answered with defenses and counterclaims.

Between July, 1916, and April 19, 1920, there was active litigation. One phase of the controversy, a motion by the defendant for judgment on the pleadings, came as far as this court (221 N. Y. 581, 116 N. E. 1077). Plaintiff expended several thousand dollars for fees and disbursements. In June, 1920, on the eve of the trial, the defendant moved for a stay of proceedings until the matters in difference were arbitrated. The Special Term denied the motion, and the Appellate Division affirmed.

1. We think the arbitration Law is applicable to pre-existing contracts, but not to pending actions.

Section 2 of the statute (L. 1920, c. 275; Consol. Laws, c. 72) declares a new public policy, and abrogates an ancient rule. "A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the Code of Civil Procedure, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Arbitration Law, § 2.

Sections 3 and 4 prescribe the procedure for the enforcement of the contract and the naming of the arbitrator.

Section 5 directs a stay of proceedings "if any suit or proceeding be brought" when arbitration should be ordered.

The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies, *Meacham v. Jamestown, F. & C. R. R. Co.*, 211 N. Y. 346, 352, 105 N. E. 653, Ann. Cas. 1915C, 851; *Akieselskabet K. F. K. v. Redieria Ktiebolaget Atlanten (D. C.)*, 232 Fed. 403, 405; 250 Fed. 935, 163 C. C. A. 185, Ann. Cas. 1918E, 491; *U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co. (D. C.)*, 222 Fed. 1006, 1011. The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.

In thus classifying its purpose, we have gone far in determining its effect. Changes in the form of remedies are applicable to proceedings thereafter instituted for the redress of wrongs already done. They are retrospective if viewed in relation to the wrongs. They are prospective if viewed in relation to the means of rep-

aration. *Lazarus v. Detr. E. R. Co.*, 145 N. Y. 581, 585, 40 N. E. 240; *Laird v. Carton*, 196 N. Y. 169, 89 N. E. 822, 25 L. R. A. (N. S.) 189; *Brearley School, Ltd., v. Ward*, 201 N. Y. 358, 363, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251. A different problem arises when proceedings are already pending. There is then a distinction to be noted. The change is applicable even then if directed to the litigation in future steps and stages. *Lazarus v. Metr. E. R. Co.*, supra; *Lampport v. Smedley*, 213 N. Y. 82, 86, 106 N. E. 922. It is inapplicable unless in exceptional conditions, where the effect is to reach backward, and nullify by relation the things already done. *Maxwell, Interpretation of Statutes* (5th Ed.), pp. 348, 370; *Reid v. Mayor, etc.*, of N. Y., 139 N. Y. 534, 34 N. E. 1102; *U. S. Fidelity & G. Co. v. Struthers Wells Co.*, 209 U. S. 306, 28 Sup. Ct. 537, 52 L. Ed. 804; *Attorney General v. Chandler*, 108 Mich. 569, 571, 66 N. W. 482. There can be no presumption, for illustration, that a statute regulating the form of pleadings or decision is intended to invalidate pleadings already served, or decisions already filed. *Gen. Construction Law (Cons. Laws, c. 22)*, §§ 93, 94. We speak, of course, of the principles that govern in default of the disclosure by the Legislature of a different intent. Nice distinctions are often necessary. *Jacobus v. Colgate*, 217 N. Y. 235, 111 N. E. 837, Ann. Cas. 1917 E, 369. The word "remedy" itself conceals at times an ambiguity, since changes of the form are often closely bound up with changes of the substance. *Jacobus v. Colgate*, supra, 217 N. Y. at p. 244, 111 N. E. 837, Ann. Cas. 1917E, 369; *Isola v. Weber*, 147 N. Y. 329, 41 N. E. 704. The problem does not permit us to ignore gradations of importance and other differences of degree. In the end, it is in considerations of good sense and justice that the solution must be found. *Maxwell*, supra, pp. 348, 370.

Applied to the case of *Berkovitz & Spiegel*, these principles and presumptions require that arbitration be enforced. The statute was enacted after the contract had been made, but before a remedy was invoked. The range of choice is governed by the remedies available at the time when choice is made. We are told that the promise to arbitrate when made was illegal and a nullity. Even before the statute, this was not wholly true. Public policy was thought to forbid that the promise be specifically enforced. Public policy did not forbid an award of damages if it was broken. *Haggart v. Morgan*, 5 N. Y. 422, 527, 55 Am. Dec. 350; *Finucane Co. v. Bd. of Education*, 190 N. Y. 76, 83, 82 N. E. 737. The result would not be changed, however, if the right to damages were

denied. A promise that differences will be arbitrated is not illegal and a nullity without reference to the law in force when differences arise. Since it is directed solely to the remedy, its validity is to be measured by the public policy prevailing when a remedy is sought. In that respect, it is not different from a promise that future controversies shall be submitted to a court. The jurisdiction of the court at the time of the submission will determine whether the promise is to be rejected or enforced. This is so whether jurisdiction in the interval has been diminished or enlarged. Of course, we exclude cases where the contract is inherently immoral or in contravention of a statute. General contracts of arbitration were never subject to that reproach. In these circumstances public policy does not speak as of the date of the promise that the parties shall have a remedy then unknown to the law. Public policy speaks as of the hour and the occasion when the promise is appealed to, and the remedy invoked.

Our decision in *Jacobus v. Colgate*, 217 N. Y. 235, 111 N. E. 837, Ann. Cas. 1917E, 369, much relied upon by counsel, has little pertinency here. We dealt there with a statute which gave a remedy for a wrong where there had been no remedy before. Right and remedy coalesced, and took their origin together. Finding them so united, we construed the statute which defined them as directed to the future. *Winfree v. No. Pac. Ry. Co.*, 227 U. S. 296, 33 Sup. Ct. 273, 57 L. Ed. 518. Here the wrong to be redressed is the rejection of merchandise in violation of a contract. Such a wrong had a remedy for centuries before the statute. All that the statute has done is to make two remedies available when formerly there was one.

We think the promise to arbitrate must be held within the statute, and the subject-matter of the controversy within the purview of the promise.

Different considerations apply to the second of the cases, in which demand is made by the Sugar Products Company after four years of litigation that proceedings in the cause be stayed. That action, as we have seen, was begun in July, 1916. The plaintiff then elected to disregard the arbitration clause, and seek a remedy in the courts. The defendant did, it is true, demand the benefit of the clause; but at the date of the joinder of issue the defense was insufficient in law. To hold that the Arbitration Law of 1920 applies in such conditions is to nullify a cause of action by relation, and by relation again to establish a defense. Years of costly litigation will thus be rendered futile.

Nothing in the language of the statute gives support to the belief that consequences so harsh and drastic were intended by the Legislature. "If any suit or proceeding be brought," its progress shall be stayed. Arbitration Law, § 5. Full effect is given to this provision when it is limited to suits or proceedings brought thereafter. We are not to presume a willingness that rights already accrued through actions lawfully initiated are to be divested or impaired. *Lazarus v. Metr. E. R. Co.*, 145 N. Y. at p. 584, 40 N. E. 240; *General Construction Law*, §§ 93, 94. In such circumstances, it is impossible to apply the statute to the stages of the litigation that remain without applying it at the same time, at least in some degree, and with some extent of prejudice, to those that have gone by.

Other questions pressed by counsel are mentioned only to reserve them. We do not now determine whether an arbitration clause, framed in contemplation of the statute of Great Britain, and calling for sessions of the arbitrators in London, is susceptible of enforcement under the statute of New York. We leave that question open. *Cameron v. Caddy*, 1914, A. C. 651, 656; *Austrian Lloyd S. S. Co. v. Gresham Life Assur. Society*, 1903, 1 K. B. 249; *The Cap Blanco*, 1913, P. 130, 135; *U. S. Asphalt Co. v. Trinidad Lake Petroleum Co.* (D. C.), 222 Fed. 1006. Enough for present purposes is our holding that pending actions are untouched.

2. The validity of the statute remains to be considered.

(a) The statute is assailed as inconsistent with article 1, § 2, of the Constitution of the state, which secures the right of trial by jury. The right is one that may be waived. *People v. Quigg*, 59 N. Y. 83; *People ex rel. McLaughlin v. Bd. Police Commissioners*, 174 N. Y. 450, 456, 67 N. E. 78, 95 Am. St. Rep. 596; *Boyden v. Lamb*, 152 Mass. 416, 419, 25 N. E. 609; *Constitution*, art. 1, § 2. It was waived by the consent to arbitrate. We are told that the consent must be disregarded as illusory because the parties could not be held to it till this statute was adopted. A consent, none the less, it was, however deficient may once have been the remedy to enforce it. Those who gave it, did so in view of the possibility that a better remedy might come. They took the chances of the future. They must abide by its vicissitudes.

(b) The statute is assailed again as abridging the general jurisdiction of the Supreme Court, which article 6, § 1, of the Constitution of the state continues unimpaired.

Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist. The people, in establishing a Supreme Court to administer the law, did not petrify the law which the court is to administer. *Matter of Stilwell*, 139 N. Y. 337, 342, 34 N. E. 777; *Clapp v. McCabe*, 84 Hun, 379, 32 N. Y. Supp. 425; *Id.* 155 N. Y. 525, 50 N. E. 274; Constitution, art. 1, § 16. Article 6, § 1, preserves the existence of the court "with general jurisdiction in law and equity," but the same article in section 3 secures to the Legislature "the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised." When change shall be held to trench on jurisdiction in a prohibited degree cannot be known with certainty in advance of the event as the result of general definition. "The process of judicial inclusion and exclusion" must serve to trace the line. Power lodged in the Supreme Court is not to be withdrawn merely that it may be transferred and established somewhere else. Power, though not transferred, is still not to be withdrawn, if fundamental or inherent in the conception of a court with general jurisdiction in equity and law. Changes, we may assume, will be condemned if subversive of historic traditions of dignity and power. Such is not the change effected by this statute. The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. For the right to nullify is substituted the duty to enforce. Contending parties have contracted that the merits of their controversy shall be conditioned upon the report of arbitrators, as upon any other extrinsic fact which agreement might prescribe. Whether they have so contracted is a question which the court must still determine for itself. Arbitration Law, § 3. If the contract has not been made or is invalid, the court will proceed, as in any other case, to a determination of the merits. If it has been made and is valid, the court will stay its hand till the extrinsic fact is ascertained, and the condition thus fulfilled. That done, its doors are open for whatever measure of relief the situation may exact. *Hamlyn & Co. v. Talisker Distillery*, 1894, A. C. 202; *Wilson v. Glasgow Tramways & O. Co.*, 5 Session Cases (Scot.), Fourth Series, 981, 992, quoted by Cohen, *Commercial Arbitration and the Law*, pp. 262, 263. The award will be enforced if valid, and for cause will be annulled. "In common language where no attempt is made at logical accuracy," it is sometimes said that the

contract of arbitration "ousts the jurisdiction" of the judges. *Wilson v. Glasgow Tramways & O. Co.*, supra. "In strictness, however, it does not oust the jurisdiction, but merely introduces a new plea into the cause" on which the judge as at common law is under a duty to decide. *Wilson v. Glasgow Tramways & O. Co.*, supra. The situation is the same in substance as when effect is given to a release or to a covenant not to sue. Jurisdiction is not renounced, but the time and manner of its exercise are adapted to the convention of the parties restricting the media of proof. Long before the statute there was a like withholding of relief, whenever the subject-matter of arbitration, instead of extending to all differences, was limited to some. *Prest., etc., D. & H. C. Co. v. Pa. Coal Co.*, 50 N. Y. 250; *Scott v. Avery*, 5 H. L. 811; *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 255, 10 Sup. Ct. 945, 34 L. Ed. 419. There was a like refusal to permit the litigation of the merits when the contract, though general, was no longer executory but had ripened into an award. The change resulting from the statute is one of measure and degree.

We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. *D. & H. C. Co. v. Pa. Coal Co.*, supra, at p. 258; *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 392, 399; *U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co. (D. C.)*, 222 Fed. 1006, and cases there cited. It was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions. *Scott v. Avery*, supra; *London Tramway Co. v. Bailey*, L. R. 3 Q. B. D. 217, 221; *Spackman v. Plurnstead Bd. of Warden*, L. R. 10 App. Cas. 22; *Trainor v. Phoenix Assur. Co.*, 65 L. T. Rep. 825. No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different

is the effect of like changes when wrought by legislation. *Alexander v. Bennett*, 60 N. Y. 204, 206, 207.

(c) Finally, the statute is said to violate article 1, § 10, of the Constitution of the United States, on the ground that it impairs the obligation of a contract. There is no merit in the contention. The obligation of the contract is strengthened, not impaired.

In the first case, *Matter of Berkovitz & Spiegel*, the order of the Appellate Division and that of the Special Term should be reversed, with costs in all courts, and the proceeding remitted to the Special Term for the appointment of an arbitrator.

Order affirmed, with costs.

NOTE—Validity of Arbitration Agreements.—In the case of *United States v. Robeson*, 34 U. S. 319, 327, the Court laid down in general terms the rule as follows: "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so."

A stipulation in a policy of insurance, not ousting the jurisdiction of the courts, but leaving the general question of liability for a loss to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is valid. So, where the insurance company requested in writing, and the insured declined the appraisal provided for in the policy, the insured cannot maintain an action for the loss. *Hamilton v. Liverpool and London and Globe Insurance Company*, 136 U. S. 242.

It will be seen that arbitration agreements are upheld and enforced within prescribed limits, but any attempt to oust the courts entirely of their jurisdiction will render such agreements invalid. In 2 R. C. L. 360, the rule in this respect is stated as follows: "It is settled that a provision or agreement in an executory contract, that any dispute which may arise thereunder shall be submitted to arbitration, will not, in the language of the authorities, 'oust the courts of their jurisdiction,' or in other words bar a suit, either at law or in equity. Such an agreement is said to be contrary to public policy, a rule sometimes attributed to the jealousy of the courts, and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction, and sometimes to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizen is renounced."

CORRESPONDENCE.

REFORM OF FEDERAL PROCEDURE.

Editor, Central Law Journal:

I have read with much interest your report of the 1921 meeting of the American Bar Association. There was one important report, the recommendations of which went through unanimously, to which you did not refer. This was the report of the Committee on Jurisprudence and Law Reform, and I call attention to it now, for the committee will need the help of the members of the Association generally in promoting the adoption of these recommendations.

1. The removal of causes from the State to the Federal Courts. We pointed out the conflict of decisions and quoted the Supreme Court to the effect that the language and ambiguity of the statutes themselves could only be removed by Congressional action. The bill we recommend in effect gives to the defendant, where the cause is otherwise removable, the right to remove to the district in which the suit is brought, even though it could not originally have been brought by the plaintiff in that district.

2. Declaratory Judgments. The differences between the bill recommended by us and by the Commissioners on Uniform Legislation is this: Our bill does not go so much into detail; it leaves more to be regulated by rules of Court, and as it is proposed as an amendment to the Judicial Code, it omits the definitions which are to be found elsewhere in that Code and do not require re-enactment.

It is drawn so as in terms to apply only in cases of actual controversy and avoids the objection which was taken in *Muskraut v. United States*, 219 U. S. 346, that the Federal Courts had no power to decide moot cases in which there was no actual controversy.

3. Appellate Jurisdiction, Supreme Court. We recommend the abolition of writs of error except in cases of the review of judgments of the higher Court of a state, and provide a remedy in all other cases by serving and filing a notice of appeal in the manner well known in the Code States. Objection has been taken to this provision on the ground that it would contravene, so far as cases tried before a jury are concerned, the Seventh Amendment to the Federal Constitution, but we pointed out that this amendment does not relate to the procedure upon review, but to the action of the Court upon the merits of the case. "No fact tried by a jury shall be otherwise re-ex-

amined in any Court of the United States than according to the common law."

If the change recommended by the Committee should be adopted by Congress, the Courts would still be bound by this amendment and would deal with verdicts and judgments rendered upon them precisely as they do now when the case is brought up by writ of error.

4. Revision of the Laws of the United States. The bill which enacts a new revision of these laws passed the House of Representatives on May 16th last and is now before the Senate. A careful examination of this bill shows many defects in the revision and the Committee urged a very careful consideration in the Senate.

5. Loss of Citizenship or Civil Rights. Under the present law, "all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies." (Penal Code, Section 355.) A conviction for such an offense involves a deprivation of civil rights. Many such offenses are technical only and it often happens that the judge gives sentence only for a fine.

The bill recommended by the Committee provides that there shall be no loss of civil rights unless a sentence of imprisonment for more than one year is actually imposed by the Court.

6. Revision of the Judicial Code. A committee, not of the Association, of which Mr. Thomas B. Felder is Chairman, has been urging a joint resolution for a revision of the Judicial Code. A Committee of the Bar Association recommended such limitation to the action of the proposed joint committee that it should not involve reconstruction of the whole Code, but solely the adoption of such amendments as experience of its working during the past ten years suggests. We understand that this amendment is agreeable to Mr. Felder and are expecting co-operation with his Committee, which has already recommended an increase in the number of Federal judges, of which your article speaks and which proposition was received with favor by the meeting of the Association, and also the increase of the salaries of Federal Judges, which has already been recommended by the Bar Association.

It will be seen from this summary of the report in question that it involves subjects of great importance. They will be brought to the attention of Congress at the regular session in December and we hope that members of the Association will take every opportunity to commend these much needed reforms to the senators in their respective states and the members of the House in their respective districts. The Bar is sometimes charged with

being indifferent to legal reforms. The charge is unjust and the present offers an opportunity for manifesting this injustice.

Yours very truly,

EVERETT P. WHEELER.

New York, N. Y.

[We gladly take advantage of the opportunity to publish Mr. Wheeler's admirable report of the recommendations of his Committee, which were unanimously adopted. These recommendations represent a very important part of the program of the American Bar Association.—EDITOR.]

HUMOR OF THE LAW.

A wealthy farmer intending to send his son to college, wrote a letter to the "Head Master of Oxford University," in which he said: "Please say what are your terms for a year; and will it cost anything extra if my son learns to write a good hand and spell proper, as well as to row a boat?"—*London Weekly Telegraph*.

William Howard Taft, new Chief Justice of the Supreme Court says he has taken a pledge of silence on public questions.

When a would-be interviewer "ran him to earth" recently, he was writing busily at a desk.

When asked to express his views on certain subjects he rose, grasped his interlocutor by both shoulders and replied with a vast chuckle:

"My dear boy, I can say nothing. I hardly dare discuss the weather since I have become chief justice."—*Cincinnati Post*.

Louisville, Kentucky, boasts of a world's war hero who is a member of the bar; a most polished Southern gentleman as well.

In court one day last week the Judge asked: "Captain, would you mind telling me how you lost your arm?"

"Not at all, not at all," replied the bronzed officer with the empty sleeve. "It happened this way: We were due for another turn in the trenches the next day, so they were giving a dance for us that night back in the rest camp. A few welfare workers were there, and among them was the cutest little girl I ever met. I managed to dance with her most of the evening, and toward the end we wandered out in the moonlight. 'Captain,' she said, after a while, 'please remove your arm.'

"And you know, she was such a little queen I just couldn't refuse her."—*The Lawyer and Banker*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Assignments—Prior Indebtedness.**—The assignment of notes and mortgages given for a precedent indebtedness has the effect to transfer the prior indebtedness, even if the notes and mortgages are void.—*De Moulin v. Magnesite Refractories Co.*, Cal., 199 Pac. 42.

2. **Bankruptcy—Personal Property.**—Under amendment of June 25, 1910, to the Bankruptcy Act, the trustee takes the status of a bankrupt creditor as of the time when the petition in bankruptcy was filed; hence, where a Pennsylvania bankrupt, engaged in road construction more than four months before bankruptcy, executed to a surety company a bill of sale in praesenti of its personal property necessary for the work, and the surety company some two months before bankruptcy took possession thereunder, the trustee in bankruptcy cannot recover the same, for under the Pennsylvania law the judgment creditor could not, after the buyer took possession, have levied thereon.—*Zehner v. Southern Surety Co.*, U. S. C. C. A., 272 Fed. 954.

3.—**Set-off of Deposit.**—Where the parties have not voluntarily made, before bankruptcy, the set-off of the amount of the bank deposits against the amount due from the bankrupt depositor, the trustee in bankruptcy must make such set-off. The fact that a bank, on the day the petition in bankruptcy was filed, accepted from the bankrupt a check for the amount of his deposits, to be applied on his note to the bank and took a new note for the balance still due, does not defeat the bank's right to set off the amount of the deposit against the amount due it from the bankrupt.—*In re Cross*, U. S. C. C. A., 273 Fed. 39.

4. **Banks and Banking—Set-off of Deposit.**—When a savings bank becomes insolvent, a depositor is not allowed to offset his deposit at its face value against the debt due from him to the bank, in the absence of statutory authority, as this would give him a greater share of the

assets than his non-borrowing fellow depositors.—*Bachrach v. Allen*, Mass., 131 N. E. 857.

5. **Bills and Notes—Gambling Debt.**—Under Penal Law, §§ 991-993, making void a check given to pay a gambling debt, not even a holder in due course can recover on such a check.—*Larschen v. Lantzes*, N. Y., 189 N. Y. S. 137.

6.—**Renewal.**—The execution of a note in renewal of a debt does not operate to extinguish the debt.—*American Trust & Savings Bank v. De Jaeger*, Iowa, 183 N. W. 369.

7.—**Set-off.**—The defense of set-off is not applicable to a negotiable note transferred for an adequate consideration before maturity, even though the transferee purchased the note with notice of the claim of set-off.—*Southeastern Rubber Works v. National Discount Co.*, Ga., 107 S. E. 598.

8. **Brokers—Contract of Agency.**—A contract whereby the owner of realty was to plat it into lots, which were to be offered for sale by a broker, the owner to receive a minimum net amount after deduction of expenses, "the lots to be sold at prices to be agreed upon, with a minimum installment price of \$200 and a minimum cash price of not less than \$150," held a mere contract of agency for the sale of lots not coupled with an interest.—*George H. Rucker & Co. v. Glennan*, Va., 107 S. E. 725.

9. **Carriers of Goods—Freight Charges.**—Terminal carrier has a right to pay the charges of initial carrier and collect the same of the shipper or consignee, though the shipment is improperly routed.—*Michigan Cent. R. Co. v. S. J. Peabody Lumber Co.*, Ind., 131 N. E. 841.

10.—**Place of Bringing Suit.**—Where shipment was made from a point on a certain railroad and a through bill of lading issued in the name of such line for transportation over several other lines, the last of which extended into the county where suits was brought, held, that court erred in not sustaining a plea of privilege filed by the railroads not running through such county nor having agents or representatives therein, where the shipment in question had been taken by a sheriff before it had ever been delivered to the terminal carrier; the shipment not being "transported" by such last carrier.—*Payne v. Coleman*, Tex., 232 S. W. 537.

11. **Carriers of Passengers—Negligence.**—If a porter steals a passenger's diamond left under his pillow, the carrier, in contemplation of law, is guilty of negligence, and liable for its value.—*Pullman Co. v. Bullock*, Tex., 231 S. W. 1112.

12. **Chattel Mortgages—Conditional Sale.**—Where the security is much greater than the debt, the transaction should be treated as a conditional sale as named in the instrument instead of a chattel mortgage, and against the general policy of law, which leans towards treating such transactions as a mortgage where the distinguishing feature is not vividly apparent.—*Schneider v. Daniel*, Ind., 131 N. E. 816.

13.—**Description.**—A mortgage of personal property in S. county, consisting of "13 head horses and mules and all that I now own. 2 horse colts coming two years old. All the above property can be identified by G. (one of the mortgagees) * * * all the above live stock to be kept in S. county"—held to contain no descrip-

tion of the horses by which they could be identified, it being too vague and indefinite.—*State v. Norman, Mo.*, 232 S. W. 452.

14.—**Foreign.**—A chattel mortgage duly executed and recorded under the laws of the state where it is executed and the property located is valid as against purchasers in good faith in another state to which the property is removed by the mortgagor unless that state has enacted some statute to the contrary, or unless the transaction contravenes the settled law or policy of the forum.—*Consolidated Garage Co. v. Chambers, Tex.*, 231 S. W. 1072.

15.—**Commerce.**—Interstate.—Where a train engaged in interstate commerce is disabled and is taken to a repair shop before continuing in such service, the delay in the repair shop does not suspend or destroy the interstate character, and an employee working upon the train in the repair shop is engaged in interstate commerce.—*Koons v. Philadelphia & R. Ry. Co., Pa.*, 114 Atl. 262.

16.—**Safety Appliance.**—Under the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, which by Act March 2, 1903, was made applicable to all cars used on any railroad engaged in interstate commerce, and under Act April 14, 1910, requiring all cars subject to the Safety Appliance Act to be equipped with efficient hand brake, a railroad company which is engaged in interstate commerce must equip with an efficient hand brake a car which was then being used for intrastate commerce.—*Reap v. Hines, U. S. C. C. A.*, 273 Fed. 88.

17.—**Constitutional Law.**—Escheat of Bank Deposits.—A statute providing for the escheat of unclaimed bank deposits to the state without any proceedings against the depositor would divest the depositor of his property without due process of law contrary to Const. art. 1, § 1, and Const. U. S. Amend. 14.—*State v. Savings Union Bank & Trust Co., Cal.*, 199 Pac. 26.

18.—**Contracts.**—Good Will.—The sale of a physician's business and good will to other physicians, and the seller's agreement not to engage in the practice of medicine and surgery in the town and surrounding country for 10 years, held valid.—*Oates v. Leonard, Iowa*, 183 N. W. 462.

19.—**Corporations.**—Doing Business in State.—A foreign corporation, maintaining no office in the state, but merely accepting orders taken by commission merchants doing business on their own account, was not doing business in the state, so that noncompliance with General Corporation Law, § 15, would prevent actions on contracts based on the broker's orders.—*Eagle Mfg. Co. v. Arkell & Douglas, N. Y.*, 189 N. Y. S. 140.

20.—**Fraudulent Judgment.**—A stockholder in defendant corporation, whose president, in collusion with plaintiff, fraudulently confessed judgment in plaintiff's favor on an unfounded claim, though not a party to the action, may intervene therein, and move for the vacation of the judgment and for leave to defend.—*Manahan v. Petroleum Producing & Refin. Co., N. Y.*, 189 N. Y. S. 127.

21.—**Covenants.**—Building Restriction.—A house built for two families held an "apartment house" within building restriction covenant against the

construction of an "apartment house" on the land, in view of the other provisions of deed making it appear that the restriction was in furtherance of an undertaking to develop the locality in which the land was situated as a high-class residential suburb, and in view of the evidence as to the meaning of the term in the minds of the parties at the time of the execution of the deed.—*Elterich v. Leight Real Estate Co., Va.*, 107 S. E. 735.

22.—**Death.**—Admissible Evidence.—In an action for death of one struck by a street car at a crossing, proof of decedent's intoxication at the time of the accident was admissible.—*Osterholm v. Butte Electric Ry. Co., Mont.*, 199 Pac. 252.

23.—**Deeds.**—Confidential Relationship.—A daughter-in-law stands in no confidential relationship to her mother-in-law, though they were on friendly terms, which would invalidate a conveyance by the mother-in-law to the daughter-in-law in consideration of the mother-in-law's support for the rest of her life.—*Noecker v. Noecker, Iowa*, 183 N. W. 441.

24.—**Electricity.**—Defective Wire.—The owner of a building who knew that electric light wires therein were so defective as to cause a ground, which might be dangerous under certain conditions, but who took no steps to locate and repair the defect, cannot protect himself against liability by claiming that he was not an expert and that he relied on information that he received from others.—*Aurentz v. Nierman, Ind.*, 131 N. E. 832.

25.—**Equity.**—Jurisdiction.—Court of equity having jurisdiction of the persons of the parties will in case of trust or fiduciary relation, act to prevent a devastavit of a trust estate by means of trespass on realty outside of the territorial jurisdiction, even though the decree will direct and affect title to land beyond the jurisdiction of the court.—*Smyrna Theatre Co. v. Missir, N. Y.*, 189 N. Y. S. 4.

26.—**Estoppel.**—Street Paving.—Where question of right of asphalt company to recover from a city damages, resulting from city's failure to levy a valid assessment and deliver valid special assessment certificates, was postponed pending a determination in an action on the question of whether or not the asphalt company had performed its work under the contract, no estoppel arose in favor of the city by reason of a subsequent action by reason of acceptance by the asphalt company of certificates which did not include accrued interest, such acceptance resulting in no damage to the city.—*Barber Asphalt Paving Co. v. City of Des Moines, Iowa*, 183 N. W. 456.

27.—**Evidence.**—X-ray Photographs.—It is proper for an expert to explain an X-ray photograph in such particulars as are not understood by a layman, but what the jury can see and understand about the matter is not a subject of expert testimony.—*Daniels v. Iowa City, Iowa*, 183 N. W. 415.

28.—**Fixtures.**—Scales.—Where administrators, at the time of the sale of intestate's farm, announced in the presence and hearing of the purchaser that certain scales were not being offered for sale with the land, and that they could be purchased by separate contract, and where purchaser bought the land with full knowledge of the fact that the scales had been treated as personal property and so treated the scales himself after his purchase of the land, he was estopped from thereafter claiming the scales as a part of the land.—*McCarty v. Twibell, Ind.*, 131 N. E. 826.

29.—**Highways.**—Poll Tax.—A road district of a township in a county operating under that form of organization, created pursuant to Rev. St. 1899, § 10321, as amended by Laws 1903, p.

272, is a political entity capable of suing and being sued, and so may recover poll taxes from one in arrears.—Road Dist. No. 41 v. Jackson, Mo., 231 S. W. 1043.

30. **Husband and Wife**—Loss of Husband's Services.—A wife cannot maintain an action in her own name for the loss of her husband's services, including the right of consortium, resulting from personal injury to him caused by the negligence of a stranger, and not the result of a malicious interference with her right of consortium.—Tobiasen v. Polley, N. J., 114 Atl. 153.

31. **Insurance**—Beneficiaries.—Though an application for insurance, made a part of the contract, provided that knowledge or information to officers of subordinate societies should not be notice to the society, etc., and though the certificate did not name as beneficiary a person of the classes designated therein, the society could not complain where it accepted the application and issued a certificate payable to the member's estate, and accepted payment of premiums with full knowledge that the insurance was so payable, as it waived its right to insist on the condition of the contract as to permissible beneficiaries.—District Grand Lodge No. 18, Grand United Order of Odd Fellows of America, Ga., 107 S. E. 774.

32.—Beneficiaries.—Where a benefit certificate designated the member's mother as beneficiary, his statement to his wife, from whom he was separated, that the insurance belonged to her, as she was the beneficiary named, and that on his death she would receive the amount payable gave her no right in the policy, where there was no agreement between the mother and the wife, and no knowledge on the part of the mother, or act done by her, rendering it inequitable on her part to receive the proceeds.—Carpenter v. Knights of Columbus, Mass., 131 N. E. 863.

33.—Construction of By-Law.—Where the supreme legislative body of a fraternal benefit association has given a reasonable construction of an ambiguous provision of its laws, the court will adopt that construction.—Fowler v. Sovereign Camp, W. O. W., Neb., 183 N. W. 550.

34.—Effect of Rider.—Unless the rider on an insurance policy is irreconcilable with the printed clause, such clause must stand; but, if it is inconsistent and irreconcilable, the rider will control.—Aetna Ins. Co. v. Sacramento-Stockton S. S. Co., U. S. C. C. A., 273, Fed. 55.

35.—Lapse of Policy.—Where an insured assigned to the insurer his wages to the extent of the monthly premiums on a health policy, and always had with his employer from whom insurer collected the premiums, enough money to pay them, the policy did not lapse, though some were not paid on time; the employer never having refused to pay on demand.—Wick v. Western Life & Casualty Co., Mont., 199 Pac. 272.

36.—Policy Against Theft.—Policy covering loss by theft of trunks, satchels, and other receptacles while in transit in the custody of any common carrier or other bailee, providing the pieces had been properly checked or delivered to the carrier against receipt, expressly required a receipt to be taken, and insured could not recover for the loss of a satchel and contents delivered to an expressman, with a list of other articles which the expressman checked off, but issued no receipt.—Hert v. Hartford Fire Ins. Co., N. Y., 189 N. Y. S. 96.

37. **Landlord and Tenant**—Altering and Subletting.—Where the seventh clause of a lease provided the tenant should have the privilege of altering the demised premises into stores, etc., and of sub-letting in part or in whole, and the eighth clause read that, except as above expressly provided, the tenant agreed not to assign, mortgage, or pledge the lease, not to underlet the whole or any part of the premises, etc., the provisions of the seventh clause were expressly excepted from the limitations of the eighth.—Gulden v. Ward, N. Y., 189 N. Y. S. 3.

38.—Counterclaim.—In an action by a landlord for possession, the tenant cannot recover on counterclaim for damages for breach of the landlord's agreement to give the tenant first right

to a new lease, since the tenant sustains no damage by such breach until after eviction.—Cortright v. Place, Ind., 131 N. E. 830.

39.—Housing Laws.—The recent rent legislation known as the "housing laws," is not retroactive, and does not apply to affect leases entered into before the passage of the laws.—810 West End Ave. v. Herzog, N. Y., 189 N. Y. S. 11.

40.—Unlawful Use.—That liquor business became unlawful held not to excuse payment of rent, where lease did not refer to character of business.—Robbins v. McCabe, Mass., 131 N. E. 799.

41. **Mandamus**—Highway Commissioners.—While a writ of mandamus will not issue directing the performance in highway proceedings of a judicial duty by the board of commissioners in any particular manner, or the rendition of any particular judgment, yet, if the board refuses to act at all, in a matter upon which it is their duty to take some action, the writ will issue to compel action, but will not dictate the kind of judgment to be rendered.—State v. Hall, Ind., 131 N. E. 821.

42. **Master and Servant**—Course of Employment.—Where a shipbuilding company operated under a contract with the federal government, on a cost plus profits basis and the company's expenses in furnishing railroad transportation to its employees were part of the cost, and an employee, after leaving the train at the place of work and while he was on the railroad right-of-way, started to return to the train on seeing a signal that there would be no work that day, and was injured in jumping across a ditch between him and the train, the injury occurred in the course of the employment, within Workmen's Compensation Act.—Western Indemnity Co. v. Leonard, Tex., 231 S. W. 1101.

43.—Course of Employment.—When a workman was killed some distance from the place of his employment, while boarding a train on which the employer furnished free transportation from the place of employment to the workman's home, held, the accident causing the death was one which "arose out of and in the course of his employment," and his widow is entitled to an award of compensation under the Workmen's Compensation Statute.—Fisher v. Tidewater Building Co., N. J., 114 Atl. 150.

44.—Defect in Car.—An employer loading a carrier's car with lumber is not liable for injuries to an employee from defects in car under Employers' Liability Act, the car not being a part of the "ways works, machinery, or plant connected with or used in the business" of the employer.—Bice v. Steversen, Ala., 88 So. 753.

45.—"Employee."—Under Workmen's Compensation Act defining an employee as any person who has entered into the employment of or works under a contract of service, express or implied, for an employer, there is no legal distinction between entering the employment of an employer and working under a contract of service for an employer, and for one to be an employee, a contract of service, express or implied, is essential.—Knudson v. Jackson, Iowa, 183 N. W. 391.

46.—"Employee."—One employed to haul logs with his own team at a specified rate per M. held an employee within the Workmen's Compensation Act, § 76, and not independent contractor, although employer having the right to exercise, unlimited control with right to discharge did not actually exercise any control over him.—Coppes Bros. & Zook v. Pontius, Ind., 131 N. E. 845.

47.—Negligence.—A railroad did not owe to its trackwalker any duty to blow the whistle of a locomotive pulling a freight train where the trackwalker was instructed to walk on the east-bound track when going west, and vice versa, in order to be able to see the approach of trains.—Bennett v. Atchison, T. & S. F. Ry. Co., Iowa, 183 N. W. 424.

48.—Scope of Employment.—Where the cook in defendant's lunchroom, finding a mouse in the garbage can took it and threatened to put it on the person of plaintiff waitress, who, in running away, fell and was injured, such cook

was not acting within the scope of his employment by defendant, so that defendant is not liable for plaintiff's injuries, though it was the cook's duty to keep things clean from mice or vermin.—*Smith v. Western Union Telegraph Co.*, Mo., 252 S. W. 480.

48. **Municipal Corporations**—"Authority to Regulate."—1 Comp. St. 1910, p. 242, § 28c, giving the council of the boroughs authority to regulate the method and manner of building dwelling houses and other structures, does not authorize an ordinance prohibiting the erection of a one-story building within 80 feet of the building or fence line on a certain street, since that is not a regulation prescribing the method or manner of building.—*Romar Realty Co. v. Board of Com'rs*, N. J., 114 Atl. 248.

50.—**Insurance of Employees**.—Cities are not empowered by any express or implied provision of any legislative enactment to enter into a contract for insuring the lives of employees of the city, for the benefit of the employees, such a scheme having no relation to any of the objects which come within the scope of a city's power.—*People v. Dibble*, N. Y., 189 N. Y. S. 29.

51.—**Negligence**.—A city, in furnishing water to its inhabitants for its own profit, was engaged in an undertaking commercial in character, and was liable for its negligent acts; and where the auditor found negligence in the original construction and location of a water main, and it was agreed that his findings were final, property owners damaged by the breaking of the main were entitled to judgment.—*Lyons v. City of Lowell*, Mass., 131 N. E. 860.

52.—**Regulations of Repairs**.—A city has the right, in exercise of the police power, to enact an ordinance retroactive in effect to compel a building owner to make necessary changes to reduce the fire hazard of a building erected prior to the passage of the ordinance.—*Coffin v. Blackwell*, Wash., 199 Pac. 239.

53. **Pledges—Security**.—Where a contract for the sale of a restaurant provided for a cash payment and a further payment of \$500 within 10 days, the delivery of war savings certificates to the seller's agent as security for the making of the first deferred payment amounted to a "pledge," under Civ. Code, §§ 2924, 2986 and 2987, and not a delivery in "escrow," though the receipt given for the certificates stated that they were to be held in escrow, as the character of a document or transaction does not depend upon misnomer, but must be determined from the facts.—*Stephan v. Lagerqvist*, Cal., 199 Pac. 52.

54. **Sales—Breach of Warranty**.—Where wholesale dealer in peanut picking machinery agreed with retail dealer to deliver machinery to retail dealer's customers for a price to be paid by retailer of 90 per cent. of the price received from customer, the relation between wholesaler and retailer was that of buyer and seller, and the measure of retailer's damages for breach of warranty as to quality, suitability, and serviceability was the difference between the value of the machinery as delivered and its value if it had complied with the warranty, with interest on such difference from the date of the breach to the time of trial; the amount received on the resale being immaterial.—*C. D. Chapman & Co. v. G. P. Dowling Hardware Co.*, Ala., 88 So. 748.

55.—**Delivery**.—Where a seller of scrap iron repeatedly promised, but failed, to make delivery, and the buyer made a formal demand for delivery accompanied by a tender of the purchase price and thereafter brought suit for breach of contract, he was entitled to stand upon his claim for breach of the contract, and was under no legal obligation to pay any attention to an offer or promise to deliver made after suit was brought.—*Sussman v. Gustav*, Wash., 199 Pac. 232.

56.—**Implied Warranty**.—Where seller made delivery to carrier for buyer, in the absence of evidence that the parties contemplated that seller should assume risk of deterioration in transit other than resulting from improper packing or unfitness at the place of delivery for shipment, there is no implied warranty that seller assures buyer against deterioration in transit.—

Harp, Hardee & Co. v. Haas-Phillips Produce Co., Ala., 88 So. 740.

57.—**Inspection**.—Buyer who agreed in order that payment for goods should be made by honoring draft attached to bill of lading had no right of inspection before payment unless entitled thereto by the custom of the business.—*Southwestern Milling Co. v. Niemeler, Ind.*, 131 N. E. 831.

58.—**Liability on Contract**.—That a buyer of machinery did not know that he would be required to sign a written contract until a few minutes before the leaving of a train, which the seller's agent wanted to take, and for that reason signed the order without an opportunity to read it, and was assured by the agent that a duplicate would be sent him which was not done, did not excuse him from liability on the contract.—*Lyon v. Williams Patent Crusher & Pulverizer Co.*, Ga., 107 S. E. 590.

59. **Specific Performance—Loss by Fire**.—Where, between the time of the execution of a contract for the sale of realty and the time of performance the premises were destroyed by fire, defendant in a suit by the purchaser for specific performance cannot complain because the purchaser is willing to take the property as it stands after defendant has expended part of the insurance money in replacing building.—*Boehm v. Platt*, N. Y., 189 N. Y. S. 16.

60. **Street Railroads—"Last Clear Chance"**.—Where a pedestrian, in full possession of his faculties, observes the approach of a street car, but pays no further attention to it, and, with nothing to obstruct his view, undertakes to cross the street in front of it, and is immediately struck, he is guilty of clear neglect of duty and the fact that he is struck is convincing proof that there was no last clear chance to save him, and that his own negligence was the proximate cause of his injury.—*Hendry v. Virginia Ry. & Power Co.*, Va., 107 S. E. 715.

61. **Taxation—Federal Control**.—The federal control and regulation of the coal industry under the Lever Act of 1917 and executive regulation in pursuance thereof conferred no immunity from state taxation as respects coal otherwise taxable under state law.—*Pennsylvania Coal Co. v. Saddle River Twp.*, N. J., 114 Atl. 157.

62.—**Tax on Capital**.—A tax on the capital of a corporation is a tax on the property in which that capital is invested.—*Commonwealth v. Union Shipbuilding Co.*, Pa., 114 Atl. 257.

63. **Theaters and Shows—Negligence**.—A leather strap, with a buckle attached, is a simple appliance. Plaintiff, who was a man of mature years, and who knew how to skate, will be presumed to have known the ordinary and usual results of the use of such appliance in the adjustment of roller skates to his feet for use in a skating rink.—*Frye v. Omaha & C. B. St. Ry. Co.*, Neb., 183 N. W. 567.

64. **Wills—Admissible Evidence**.—In son's contest of father's will disposing of property which had been held in partnership with the son testimony by the son as to amount he had inherited from his mother's estate and had invested in the farm which had been held in partnership with the testator held admissible.—*In re Armstrong's Estate*, Iowa, 183 N. W. 386.

65. **Workmen's Compensation Law—Director General of Railroads**.—Under South Dakota Workmen's Compensation Law, providing that all employers or employees, not engaged in interstate or foreign commerce, shall be bound by its provisions unless they affirmatively exempt themselves therefrom; that "employers" shall include the state, its municipal corporations, and other political subdivisions, and that all employers, except the state and such subdivisions, shall procure insurance, furnish acceptable proof of solvency or make a guaranty deposit, the Director General of Railroads, who by presidential order was made subject to "all statutes and orders of regulating commissions of the various states," in operating lines in South Dakota and with respect to employees injured or killed in his service and not employed in interstate commerce held subject to the provisions of such statute.—*Hines v. Meier*, U. S. C. A., 273 Fed. 168.

Central Law Journal.

St. Louis, Mo., October 21, 1921.

DOES ARBITRATION OUST THE COURTS OF JURISDICTION?

The courts of this country will either have to confess error and retrace their steps or the legislatures must come to the relief of the business men who compose the various chambers of commerce in this country who are demanding that the law recognize the validity and irrevocability of arbitration agreements.

All the world recognizes such agreements but the United States, and here alone judicial jealousy has operated not only to prevent business men from establishing more expeditious means for determining business controversies, but has burdened the courts with much litigation which could have been transferred to arbitration tribunals like those in London and other great commercial centers. In this country alone, our judges, following a rule of the English common law which the English judges discarded over fifty years ago, refuse to enforce an agreement to arbitrate, although they will enforce an award of arbitrators. This anomalous position is explained in some degree by the history of arbitration agreements.

Arbitration, in spite of the fact that it has sometimes been frowned upon by the courts, is not of statutory origin, but is one of the ancient practices of the common law, as well as of the civil law. The statute of William III and other statutes like it in England and America, did not originate the practice of arbitration, but simply provided a method of transforming the award of the arbitrators into a judgment. At the common law, an award has no more binding effect on the parties than the original obligation created by the contract of the parties. As said by Russel, J., in *Evans v. Edenfield*, 7 Ga. App. 175, 66 S. E. Rep.

491, "the difference between a statutory award and a common-law award is that the latter affords only a basis of an action; it is binding on the person submitting, but it can only be made the foundation of an action, and is not entitled to be made the judgment of the court."

Judges of narrow vision have always shown an unmistakable jealousy toward arbitration. Lord Mansfield, who did more for the extension of the law to meet the needs of commerce, is justly entitled to credit for doing much in his day to prove to the courts that arbitration was not a practice intended to reflect adversely upon the courts, but a practice justified by the needs of business. In *Simmonds v. Swaine*, 1 Taunt. 549, Mansfield declared that "the courts have sometimes been very strongly inclined against awards, as carrying away causes from their own jurisdiction to the decision of private persons, but they now give these instruments a more liberal construction."

In *Fluharty v. Beatty*, 22 W. Va. 698, the Court said that in the early history of English jurisprudence, "the established tribunals manifested jealousy of so irregular a substitute as was presented by a board of arbitration liable often to be composed either in whole or in part of laymen."

The "more liberal attitude" which Mansfield declared the judges were taking toward arbitration in his day was probably a result of Mansfield's own commanding legal personality which shamed all the objectors to silence. The prejudice exists today, at least in America, and shows itself in the stubborn resistance of the Courts to any extension of the principles of arbitration and especially to every effort to secure for the agreement to arbitrate the attribute of irrevocability.

Why were agreements to arbitrate held to be revocable? Our courts declare that to hold them to be irrevocable would oust the courts of jurisdiction. The early common law cases simply declared that they were revocable on the technical ground that they cre-

ated agencies or powers not coupled with an interest (clearly erroneous) and therefore revocable by the authority which created the power at any time before the power was executed. Our American courts have followed the older English cases with sheep-like blindness, utterly ignoring the later English cases which have overturned the rule at common law. The only contributions our courts have made to the subject consist of the different reasons assigned for the rule itself. Our courts have rationalized a patent judicial error until the rule itself appears plausible to the superficial student of the law.

It is interesting to note that many English judges were never in sympathy with the common law rule and expressed their regret on not a few occasions. In *Northampton Gaslight Co. v. Parnell*, 15 C. B. 630, 80 E. C. L. 630, 139 Reprint, 572, Maule, J., said: "The old rule upon which it was held that the power of an arbitrator was revocable, was that a power not coupled with an interest was revocable,—revocable by the authority which created it. From that rule it was inferred—erroneously, as I think—that one of the parties to a submission might revoke without the other. It seems to me that that was allowing one man to affect the interest of another. But it was an inveterate error."

The American courts have, in most cases, abandoned the technical ground on which the rule first rested and have substituted the foundation of public policy which sounds better and, like all other rules resting on public policy, affords a more impregnable front to all assaults. In *Parsons v. Ambos*, 121 Ga. 98, the Court dismisses all other reasons except the one that "unless an agreement to arbitrate is held to be, by its nature, revocable before the award is made, nothing would be easier than for the more astute party to oust the courts of jurisdiction." The Court then concludes: "But whether predicated on the idea that the agreement is repugnant to the contract or to public policy, the principle is universally

recognized that such general submissions are revocable."

When the Georgia Court made the declaration of the "universality" of the rule it was discussing, the English courts had already repudiated it and there was no civilized commercial nation in the world that held to such a rule. What can the word, "universal" mean in such a connection? In *Dickson Mfg. Co. v. American Locomotive Co.*, 119 Fed. 188, in which the defendant's contention that the plaintiff's express agreement to be bound only by the finding of an arbitration tribunal, operated to prevent his resort to the courts, was denied, the Court said that "in such a case as this even an express covenant not to revoke would not prevent a revocation, and further, the Court said: "It is not in the power of parties to a contract to oust the courts of their jurisdiction."

The decision which started all the trouble was by Lord Coke in *Vynior's Case*, 4 Coke 302. This was a suit on a bond given to enforce a submission to arbitration. Defendant revoked the power of the arbitrator, refusing a submission. Vynior, the other party to the agreement, then brought suit on the bond and recovered. The theory of the recovery was that defendant had breached one of the conditions of the bond "to submit his case to arbitration." The case really should have turned on this point alone, namely, the violation of an express provision in the bond; but the Court makes a further statement upon which the early English cases relied, but which our American judges seldom repeat, namely: "A man cannot by his act make such authority, power or covenant not countermandable, which is by the law and of its own nature countermandable." The reason that modern courts do not mention this reason is that it is hardly tenable today in view of the growth of the law in regard to the obligation of parol contracts. Such contracts, in most cases, were not enforceable at common law, if "God's penny" had not passed. Of course, if the agreement to submit a case

to arbitration creates no *obligation* on either party to submit to arbitration, then, like any other unilateral promise, it is not obligatory until acted upon and may be revoked at any time prior thereto. But if it is an enforceable promise, the obligation should be recognized by the law.

The first case to assert the reason that an agreement to arbitrate ousted the courts of jurisdiction was *Kill v. Hollister* (18 Geo. II 1746), 1 Wils. 129. This declaration was made in a case where the defendant had not insisted on a submission and the simple question was whether a clause in the contract agreeing to arbitrate necessarily prevented the Court from taking jurisdiction of a suit upon such contract. The Court said it did not, but were careful to say that if a reference were pending, the result would have been different. It is interesting to note that in that case, Sir John Scott, afterwards Lord Eldon, declared in argument that "the jurisdiction of the Court is not ousted by an agreement to arbitrate more than by a release of all right of action."

The rule thus established in *Vynior's Case* and in *Kill v. Hollister* was brought over to America and there it has become so rigid as to obstruct all attempts to enlarge the field of commercial arbitration. In England, fortunately, there were judges like Lord Campbell and Lord Cranworth who saw the error and the danger in such a rule. Those judges, after a quarter of a century of argument and vacillation on the part of the courts of England, succeeded in overcoming the rule and establishing arbitration agreements on a par with other agreements and relieved the English courts of the charge that they were willing to allow their jealousy to stand in the way of the necessities of English commerce. The first breach in the old rule was made by Lord Campbell in the case of *Scott v. Avery*, 5 H. L. C. 811. In this case, Lord Campbell refused to take jurisdiction of a controversy over an insurance contract which the parties had agreed should be submitted to arbitration. Lord Campbell said the parties had a right

to make such a contract and said he could find no vital rule of public policy which interfered with the enforcement of the agreement to arbitrate. "On the contrary," he said, "public policy seems to require that effect should be given to the contract of the parties. For," he argued with irresistible logic, "what pretense can there be for saying that there is anything contrary to public policy in allowing parties to contract, that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree?"

Lord Campbell's opinion changed the law of England. Some of the judges, it is true, hesitated to go so boldly in the very face of the rule of *stare decisis*, but in less than a generation the validity and irrevocability of arbitration agreements were fully established in England and a new jurisprudence built up regulating the enforcement of awards made by private arbitration tribunals that have since been created in every great board of trade in England, to which it is now customary in England to refer all disputes arising in business transactions. *Viney v. Bignold* L. R., 20 Q. B. D. 172.

American business men are properly demanding the same facilities for determining business disputes which other business men in other parts of the world are enjoying, and it remains to be seen whether our courts will be as liberal and as generous as the English courts have been in conceding the point involved. A straw which shows how the wind is blowing is the decision of the New York Court of Appeals in the case of *Berkovitz v. Arbib*, 130 N. E. Rep. 288, 93 Cent. L. J. 263. In sustaining the validity of the Arbitration Act of New York, the Court declared that the idea that such agreements oust the Courts of jurisdiction is not tenable. On the contrary, the Court declared that "jurisdiction is not renounced, but the time and manner of its exercise are adapted to the convention of the parties restricting the media of proof." The Court declared that this rule always

had "a feeble hold upon the common law" and that at any rate, that Court would "not go so far" as to hold that it had become "imbedded in the foundations of our jurisprudence" so that "nothing less than an amendment to the Constitution could change it."

NOTES OF IMPORTANT DECISIONS

TO WHOM DOES A PATENT RIGHT BELONG AS BETWEEN EMPLOYER AND EMPLOYEE.—In view of the fact that it is very difficult to draw the line between employer and employee as to their respective rights in the inventions of the employee, discovered in the course of his employment, it would be wise for both to enter into a contract specifically determining the extent of their mutual rights and obligations with respect to the inventions of the employee.

In the recent case of *Wireless Specialty Apparatus v. Mica Condenser Co.*, 131 N. E. Rep. 307 (Mass.) it was the employee who suffered and lost the benefit of his invention. In most cases however, it is the employer who suffers.

In the great majority of cases an invention made by an employee, in the course of his employment and at his employer's expense is the property of the inventor unless he has by the terms of his employment, or otherwise, agreed to transfer to his employer its ownership as distinguished from its use. It matters not how valuable the invention or how vital its control may be for the success of the business in which it has been conceived (*Am. Circular Loom Co. v. Wilson*, 198 Mass., 182, 84 N. E., 133, 126 Am. St. Rep., 409; *Am. Stay Co. v. Delaney*, 211 Mass., 229, 97 N. E., 911, Ann. Cas., 1913B, 509; *Hapgood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct., 193, 30 L. Ed., 369; *Dalzell v. Dueben Mfg. Co.*, 149 U. S., 315, 13 Sup. Ct., 886, 37 L. Ed., 749; *Pressed Steel Car Co. v. Hansen*, 137 Fed., 403, 71 C. C. A., 207, 2 L. R. A., N. S. 1172; *Dempsey v. Dobson*, 174 Pa., 122, 34 Atl., 459, 32 L. R. A., 761, 52 Am. St. Rep., 816.)

In the *Condenser* case just referred to the plaintiff decided to turn its operations from war work to the industrial field. It therefore directed one of its employees, who was a party

defendant, to make experiments with its radio condensers for the purpose of devising a method of making such condensers available for other electrical apparatus. His employee discovered a condenser which would serve the purpose sought by his employer, but applied for the patent in his own name. He then entered the employ of defendant and assigned to his new employer his rights in the patent for which he had made application. Plaintiff, in his present suit prays that the defendants be compelled to assign the patent to plaintiff, on the ground that it was a secret process belonging to the plaintiff. In sustaining a judgment for the plaintiff the Supreme Court of Massachusetts said:

"There is no doubt whatever of the proposition that the mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected and obtaining patents therefor as his individual property, and that in such case the government would have no more right to seize upon and appropriate such property than any other proprietor would have. On the other hand, it is equally clear that if the patentee be employed to invent or devise such improvements his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do. See also *Mc Aleer v. United States* (150 U. S., 424, 430, 14 Sup. Ct., 160, 37 L. Ed., 1130), *Dowse v. Federal Rubber Co.* (254 Fed. 308) *Ingle v. Landis Tool Co.*, (D. C., 262 Fed., 150), *Pomeroy Ink Co. v. Pomeroy* (77 N. J. Eq., 293, 297, 78 Atl., 698), *Portland Iron Works v. Willett* (49 Or., 245, 89 Pac., 421, 90 Pac., 1000)."

Many of the older cases do not go as far as the *Condenser* case; most of the judges being content to limit the rule that an invention belongs to the employee who invents it only where the employer, by the express terms of the hiring, demands the fruit of the employee's inventive labor. The United States Supreme Court, in the case of *Solomon v. United States* 137 U. S. 342, adopted the breach of trust theory and held that where the employee is specially employed for the purpose of making improvements, it would constitute a breach of trust and confidence on the part of the employee for him to use the information thus gained at his master's expense for himself in all cases where the new method discovered is one which the master employed the defendant to seek for. The Court held that the want of an express contract, necessary under the old rule, was not required under such circumstances.

THE FUNCTION AND SCOPE OF A COURSE IN LEGAL LIABILITY.

In 1914 Prof. Beale of the Harvard Law School published his case-book on Legal Liability. This was the first time, so far as the writer is aware, that legal liability was looked upon and taught as a subject apart from its ordinary context in the law of torts and the law of crimes. In the past seven years several schools in the Association of American Law Schools have added the course to their curriculum. At the last meeting of the Association of American Law Schools, it became apparent that those who are teaching, or have taught the course, are at odds as to the value and function of the course. Prof. Beale himself has not, to the knowledge of the writer, expressed his ideas as to the value of the course as a separate subject matter, but in the preface to the first edition of his case-book (which preface remains unchanged in the second edition just published), he indicates the object of the course when he says:

"The subject of the present collection is that body of legal principles which determines whether one may be charged with the consequences of his act. Not all the requisites of ultimate liability are here considered; the element of blame is not treated. It is left for a more particular study of the law of Torts to determine what degree of intention, malice or negligence must exist before one may be forced to make compensation for a wrong; and for the study of Criminal Law to determine how far a guilty mind is requisite before punishment can be inflicted. The topics here considered are those fundamental ones which are a common element of torts and crimes; and the object of the collection is to prevent that duplication of effort which has hitherto existed through the attempt to include instruction in these topics in courses on Torts and Crimes."¹

That is, taking into consideration the exigencies of an already overcrowded law school curriculum, whatever would prevent

duplication of effort on the part of the student and the teacher is a good thing, and the function of this course is to prevent, to some extent, that duplication of effort in the sphere of Torts and Crimes. But, I venture to believe, with all due deference to Prof. Beale, that if the prevention of such duplication of effort is all that Prof. Beale sees in this course that he has carved out of two others, he has builded better than he knew. His highly developed and keenly functioning teaching instinct has delimited a subject matter which lends itself marvelously well to a teaching dialectic, the function of which is to shake loose the mind of the beginning student of law from the mess of lazy, hazy, slipshod and inchoate mental processes which he has acquired in his pre-legal stage of education, and to develop, so far as it is humanly possible so to do, an ability to think clearly, to reason accurately, to use language intelligently, and to remember that words and phrases are meaningless unless their content can be made explicit and they are applied in their proper spheres with discrimination. It is, therefore, my purpose, in this article, to indicate what the function and the scope of a course in legal liability are, to my mind. I purpose to approach this problem from the standpoint of pedagogy and not from the angle of substantive law, for I think that this course is primarily one for the stimulation and development of mental processes, and, secondarily, for the imparting of a legal subject matter, although that subject matter which is treated and used as a content in the course, has also an intrinsic value of its own. In so approaching the problem three things will be considered, the function of a law school, the first year curriculum, and the mental fibre of the beginning student of law.

The function of a law school is to teach its students the technique, the purpose and the subject matter of that method of social control which we call the legal ordering

(1) J. H. Beale; *Cases on Legal Liability*, 2nd Ed. 1920.

of society.² This of course, marks off very distinctly the true law school from the school where legal subject matter is taught to those who wish to practice law as a trade rather than as a profession. It differentiates the truly professional school from, to use Prof. Beale's felicitous phrase, "a trade school for legal artisans." If one looks upon the practice of law as a trade like carpentering or upholstering, there is of course a field for the trade law school, but if the law is really a profession and if those who study for this profession are to pursue their tasks in the same spirit as those who enter upon the study of theology or medicine,³ then we have no concern whatever with the legal trade school. The theory which animates the schools which are members of the Association of American Law Schools is that students who study at these schools are preparing for the practicing of a profession and not for the carrying on of a trade.

Classified on the basis of entrance requirements, the Association Law Schools are of three kinds; those which are graduate schools, those which require some years of college work, and those which demand only a High School education. But if we classify the law schools upon the basis of what the student wants to do while in

the law school, the Association Law Schools are of two kinds, the college of law, and the true law school. The college of law is the institution to which the student comes in lieu of going to college, and he is interested while at the institution not only in the study of the law but in usual college activities, such as glee clubs, debating, Junior Prom, fraternities, sororities, varsity basketball, football, baseball, and track teams. The student is really going to college but is taking Law instead of Arts or Science as the pathway toward his degree. The true law school is the institution to which come students who have had two or more years of college life so that the distractions of undergraduate extracurricular activities pass them by untouched or only slightly moved. These students come to the law school to prepare for the serious business of earning their living by, and making their contribution to society through, the practice of the law. The acquisition of a legal training is of primary importance to them. They allow little or nothing to turn them aside from the pursuit of the law.⁴

The mental fibre of first year students in both types of institutions is practically the same. The severest indictment that can be made of our high school and college educational systems is that they do not turn out a product which, with rare excep-

(2) "The primary object of the law school is to train men to be successful and effective lawyers; not moneymakers or skillful practitioners merely, though each of these is good when achieved honorably, but profound lawyers who will do honor to their profession and subserve the public good." J. C. Towne; *The Organization and Operation of a Law School, Handbook, and Proceedings, Association of American Law Schools, 1910*. The Handbook and Proceedings will hereafter be cited as "Proceedings." "To teach law as a science rather than as an instrumentality of a money-making trade; to teach it from the theoretical side by teachers experienced in practice; to encourage legal research and the production of legal literature; and finally to stimulate in the student knowledge of, and respect for, the professional obligations of the lawyer, are at once the high privilege and duty of the law schools of this country." Harlan F. Stone; *The Function of the American Univ. Law School; Proceedings, 1911*. Cf. Also William H. Taft. *The Social Importance of Proper Standards for Admission to the Bar. Proceedings, 1913*.

(3) William H. Taft, *Ibid*.

(4) The line of distinction which I have attempted to draw is, of course, not an absolute one. In colleges of law there are men of maturity to whom "college life" means nothing, and who devote themselves whole-heartedly to the study of the law; and in law schools there are students who still have the instincts of college freshmen. This individual personal equation is recognized, but after all, and in the main, the students are of the two types indicated. Whether in either type of school the student is made into a legal mechanic or a professional practitioner depends entirely on the faculty. As are the instructors, so become the students. Cf. David Starr Jordan; *The University, the College and the School of Law, Proceedings, 1908*; John C. Townes; *Organization and Operation of a Law School, Proceedings, 1910*; W. R. Vance, *The Ultimate Function of the Teacher of Law, Proceedings, 1911*; H. S. Richards; *Progress in Legal Education, Proceedings, 1915*.

tions, possesses a fund of solid, substantial information, or an ability to go to the sources where this information can be obtained. Neither do they turn out a type of mind which knows how to think clearly, reason accurately, or approach a problem with any degree of recognition of the value of a scientific or a purely human approach. The result is that the average law school or college of law has in its first year class a large number of students, each of which is a raw, untrained and unintellectual person who does not know how to look at a thing which is placed before him and who has not learned to find the things which are not directly in his path. He is unable to reason, even half-way logically, either from a given set of facts to a conclusion, or from a given theory to a wider or narrower hypothesis. He has not the ability to be inductive or deductive in his mental processes. He cannot, will not, has not the desire to set himself genuinely to intellectual functioning. He has to be spoon-fed, and sometimes he is too lazy even to gulp. This may seem a harsh indictment but the experience of teachers in the past twenty years bears it out.⁵

If the above analysis is correct, it is obvious that there must be in the first year curriculum a disciplinary course which will attempt to bridge the gulf existing between the lazy, undisciplined mental workings of the beginning student of law and the close-knit, reasoning processes which the student must adopt if he would become a genuine student of legal subjects. This attempt must be made consciously, persistently, in-

tensively. The subject matter which is to act as the vehicle for conveying the mental discipline should consist of some fundamental will constantly meet in all of his legal studies.

The course, which to my mind does actually lend itself in a most admirable fashion to the mental disciplining of the student while he is acquiring the fundamentals which he must know is the course in legal liability. It is a substratum, cross-section course. It contains that to which sound reasoning in any section of substantive law leads ultimately; for it deals with the nature and meaning of acts, omissions, causes and causation, duty, authority, and privilege. Furthermore, it deals with the simple, basic facts of philosophy, sociology, economics, politics, science, religion, morals, medicine, and business, upon which the common law is built, and it compels the student to work through the facts given him to these basic considerations.

This does not mean that the course in legal liability is a course in elementary jurisprudence. It isn't. Nothing, to my mind, could be more harmful than the giving to first year students at the opening of their legal education of some half-baked ideas as to what the instructor thinks the proper juridical concepts are. That would be but adding muck to a mess. The student already has more dogmatic concepts and ideas than are good for him. The course in legal liability is intended to make his mind more flexible and less dogmatic than it was. Its function is squarely that of making the students attempt to think. It employs as its vehicle, definite, though few and simple, concepts, ideas and principles, as they are found in the decided cases and as they are used, in normal fashion, by the Bench and Bar. It is not interested in determining the ultimate truth or falsity of the subject matter, but in determining the meaning and function of this subject matter.

Some who have taught this course have found it wanting. They say that it has no value at all, or that if it has any value, it

(5) H. S. Richards, *Progress in Legal Education*, Proceedings, 1915; "One of the most perplexing problems for every law school is how to deal with that class of students who have apparently not acquired mental discipline in their pre-legal training. Of course, if the man is simply stupid, the sooner he is disposed of, the better; but many men in this class have fair natural capacity, but having been accustomed to the leading methods of secondary schools, and after having acquired a degree by the careful selection of snap courses in college, they enter the law school intellectually flabby, unaccustomed to sustained mental effort, quickly tired, easily satisfied, and lacking intellectual curiosity."

should be taught as a second year subject. But, it is submitted, and with no intention of being unseemly, that the fault lies with the instructor and not with the course. For no one should teach his course who has not had a thorough training, in addition to his law, in logic, philosophy, social psychology, the principles of teaching by dialectic, and one of the sciences like mathematics, chemistry or medicine. The purely analytical lawyer is unable to teach this course; the teacher who is a follower of the historical school of jurisprudence can come closer to conducting the course properly; but only a student of sociological jurisprudence can see and manipulate all the problems presented by the course, and teach it as it should be taught if it is to fulfill its function.⁶

The scope of the course in legal liability is determined in part by its function and in part by the subject matter which is to be utilized for the fulfillment of this function.

In his case-book Prof. Beale has a chapter which he calls "Law." Here he presents extracts from cases and commentaries which aim to indicate the nature and meaning of Law, the origin of the Common Law in America; the meaning and extent of sovereignty, and the jurisdiction of courts and legislatures. It is significant, however, that in his own teaching he does not deal with this chapter. Whether this is due to the fact that he does not think that a course on jurisprudence should be taught to first year men; or that the time at his disposal will not allow the study of this chapter; or whether the subject matter can better be treated in other courses, I do not know. In my own, limited, experience I have found that the first chapter is of no value from a pedagogical standpoint because the subject matter is in its nature too abstract and general. It belongs to a course on the Conflict of Laws, and there indeed Prof. Beale treats it with consummate skill.

So, too, I think that the chapter on the Measure of Compensation,⁸ is not pedagog-

ically a part of the course. It is really an attempt to present a denatured course on Damages and has no place in a first year curriculum.

The subject matter of the course properly begins with chapter two. Here we deal with the nature of an act and an omission; determine what is meant by a cause and causation; and see how far along the chain of causes which connects every event with every other event in the universe we need to go, either backward or forward, before we can stop and determine whether liability shall be imposed for the forbidden act of omission. Here, of course, we are dealing with the most fundamental of all things in the law. For, ultimately, all legal problems, it is submitted, are based upon the fact that some one does, or wishes to do, or fails to do, that which under the circumstances of time, place and purpose is forbidden. Without an act or an omission which is forbidden there is no starting point for the imposition of any kind of legal liability. To determine, therefore, what an act is, and how to differentiate it from an omission, is of great importance. It makes a difference in the method of approach to the substantive law of torts, crimes, contracts, agency and conflict of laws, whether we consider an act as an internal volition which happens to have an external manifestation, or whether we will simply look at the objective world and, noting that a change has or has not taken place, say that the change or the absence of it is the act or the omission. The first calls for the consideration of speculations in psychology while the second calls merely for a simple inspection of objective phenomena. And, the reader will please note, that the interest of the course is not in making the student a follower of Arndt, of Windscheid, or James, or Dewey,⁹ but in making the student see that there are divergent viewpoints, and what these are, and how the acceptance of one or the other would affect his reasoning and his conclu-

(6) Cf. Papers and Discussion Concerning the Redlich Report, Proceedings, 1915.

(7) Chapter 1.

(8) Chapter 6.

(9) Cf. Pound; Readings in the Roman Law, page 22; James; Psychology Chapter on the Will; Dewey, How We Think.

sions. It is not *what* the student believes but *why* he believes it and *how* he applies his belief that is of primary importance.

Omissions are constantly called causes in the same way that acts are. Yet if by cause is meant that which produces a change, or starts a force, or creates something which was non-existent before, or determines actively the direction and scope of a force or situation, then an omission cannot possibly be a cause. For a *failure* to do never *starts* a force; it never changes anything actively; because nothing is *done*. Where there has been no activity, no releasing of forces, no changing of situations, then the only thing we can see or talk about is the continuance of an activity or force or pre-existing situation and the failure to change this. By an act something is started; by an omission something is not stopped. This is quite obvious, yet it is difficult to get the student to see that the failure to do, nonfeasance, is never the same thing as the doing, feasance or misfeasance, although compensation for injury may be exacted from one who has acted or failed to act.

The discussion of the nature of a cause is of great importance. In the law of torts, crimes, damages and agency one is constantly meeting with instructions to juries which have to do with the maxim "*causa maxima non remota spectatur*," with definitions of proximate and remote causes, with distinctions between direct and consequential damage, and with the application of the rule that a proximate cause is that which leads to natural and probable consequences. This terminology must be grappled with and understood at the very outset of the student's legal career, or it must be constantly reiterated in every course where such language is used. There is, of course, merit in the repetition of ideas when these ideas naturally crop up during discussion in particular classes. But this repetition value is counter-balanced by the amount of time the development of the idea by the dialectic method consumes, and it is submitted that such general terminology

should be threshed out at the beginning of the first year, so that no matter how much the various instructors in the school should differ as to the minutiae of interpretation of the terms, or even as to fundamental concepts, the student has already in his first half-year acquired a basis for fruitful discussion.

This of course presupposes that the teacher of legal liability is not trying to establish a terminology which is *his* terminology. That would be futile and foolish. The instructor is interested, not in making the student acquire a term or definition but in making the student's mind function by drawing distinctions between the various definitions of a word or fact. Definitions are of importance as points of departure and not as resting places. If the definition which the student finally acquires grows out of a consideration of many and diverse variations of this definition, it will be to him not a yardstick to be used in an arbitrary fashion for measurement purposes, but a standard for the guidance of his judgment in new situations. "The mark of his (the student's) lawyerlike quality will be his ability to discern the legal significance and legal possibilities of a new set of facts."¹⁰ The function of a legal definition is to aid the student in applying his knowledge to a new set of facts.

No fact, proposition, situation or life exists by itself. Things are connected and inter-related. As Bishop Butler long ago said; "When I thump the table, I jar the stars." But for practical purposes the lawyer is concerned only with the facts immediately surrounding the activities of his client and those whom his client is suing or defending against. Somewhere within the universal chain of cause and consequence there must be a practical starting and stopping place so far as the specific case before the lawyer is concerned. To find this place is the function of the principle of proximate causation. In discussing this principle

(10) E. R. Thayer, *Law Schools and Bar Examinations*, Proceedings, 1913.

the student is given an indication of the limits of his field of inquiry. He is made to see that though the chain of cause and consequence stretches back to the beginning of time and forward into eternity, *he* is only concerned with the particular act of the person upon whom he is trying to fasten a liability and the specific consequence which is the injury done to his client. He is also made to realize that there are well-defined principles of law that govern the stopping and starting place of his inquiry, whatever that inquiry may be.

This is of vital importance. It involves teaching the student how to limit the sphere and scope of his inquiry. Even if the student has had that kind of training in his High School and College days, (which is hardly probable) still there is a necessary and inevitable place within the law school curriculum for a course which re-directs the student's abilities when dealing with that which is new to him, namely legal subject matter. The ability to handle electrical apparatus, economic formulae, and the binominal theorem needs to be re-shaped somewhat before the student can handle even the most commonplace problems of any section of substantive law.

Then, too, the study of the theory of proximate cause will present cases, which, if properly analyzed, will teach the student how to differentiate between the rule of law for which the case stands and the method of reasoning by which the court arrives at its decision. It is a truism of legal study that judges have an uncanny instinct by means of which they reach a correct solution of a given case, while at the same time the reasoning by which they attempt to support their decisions is often fallacious and sometimes ludicrous. This is particularly marked in cases dealing with proximate cause, for here the courts are using terminology and follow lines of reasoning which constantly lead them to conclusions so psychologically impossible that one wonders how courts can be so blind to

the meaning of their own phrases.¹¹ The reason for this is that the courts are so busy that they cannot take the time to analyze the language they are using but are blindly following precedent. Certain phrases have been used before, so they use them again. The doctrine of foreseeableness, the language to the effect that a man must be held to expect the natural and probable consequences of his acts, that the proximate and not the remote cause must be held liable, are constantly being repeated in the cases, and yet few of the judges analyze the terms they are using. If they did they would often see how utterly unrelated to their actual decisions they are.

In this section of the course, then, the student is to be taught to distinguish between that which is a datum of substantive law, (namely the combination of specific facts, the question growing out of these facts and the way the question was answered), and that which is merely a method of solving the problem presented by the case, namely, mental processes of the judge). The former is fixed; and however much it may be distinguished from other cases, circumscribed or delimited, attacked and explained away, it stands as binding until reversed by another court of competent jurisdiction. But the latter is not binding. It is a tentative guide and not an unimpeachable dogma. The decision must be accepted, the reasoning of the court can be ignored if better reasons present themselves. Students rely too much and too blindly upon the language of the court, a text book, or the instructor himself. They must be taught to think about and criticize the language as well as the facts. They must be made to *explain* their reasons for a given holding as well as to memorize these reasons.

The function, then, of chapters two and three of the case-book is to develop in the student an ability to analyze and frame definitions, to recognize which definitions can be utilized for the solution of his specific

(11) Cf. Levitt; *Proximate Cause and Legal Liability* 90 *Central Law Journal* 138, 191 et seq.

problem, to see how legal facts are related to each other, to limit the scope of his inquiry within relevant spheres, to distinguish between the fixed and tentative factors in each case, and to realize that there must be some genuine, unequivocal relation between the act or omission which is charged to the defendant and the specific injury which the plaintiff has incurred.

Liability will be imposed upon individuals by reason of their acts or omissions, not only because of their relations to other individuals as individuals, but also because of their relations to the State and to society generally. When the interests of one individual is balanced against the interests of another individual, there is no inherent reason why one should outweigh the other. At most the Law can but take a fair rational rule and apply it to the dealings between the two individuals. But when the interests of the individual come into conflict with the interests of society, either in its organized form, the State, or its inchoate form, the general body politic, not merely rules but principles and standards need to be considered, weighed and enforced. The individual is a societal creator and creation. He cannot exist alone. His actions affect groups and masses of people. His activities have, or may have, consequences which need to be confined, controlled, restrained and curbed. As the circumstances of time and place change he may be free to act or not as these circumstances may determine. An inflexible rule of conduct cannot be applied to all of his activities. What is proper in one set of circumstances may be improper in another set of circumstances. His activities must be judged by standards of conduct, and liability must be imposed upon him, if at all, because of principle underlying social relationships, and not because of a fixed rule or concept of law, which is applicable only when an individual is balanced against an individual.

It is to such principles and standards that the class room discussions of the cases in

chapters four and five of the case-book ultimately lead. It is here that the definite relationship between the individual and the State and Society emerges in its legal aspects. It is the first time, as the ordinary curriculum runs, that the student is faced with this problem and made to apply himself to it. Here he learns that an individual must make compensation for the results of his activities, even though these are not the proximate consequences of his acts and even though the element of blame in his conduct is negligible. He begins to see that public, and social interests outweigh more often than not, individual interests. This is particularly true of the subjects studied in chapter five. For here the student considers the reasons why men are allowed to destroy property, reputation and even life itself, without being punished. He is taught that certain types of acts, under some circumstances, are permitted, and that he will be protected in the doing of these acts and will not be held accountable for their consequences. He discusses the meaning of duty, authority and privilege and delimits the sphere within which each applies. Above all this is an excellent place for eradicating the tendency on the part of the student to use the word "right" when he means almost anything but a legal right. Insistent curbing of the use of this term results, in a very short time, in having the student use the term very rarely, and then only with a careful definition attached thereto.

At this point it may be urged that in spite of my former statement that I am not in favor of giving first-year men a course in denatured jurisprudence, I am actually teaching a section of jurisprudence. For, nothing can be more obviously a part of jurisprudence than the nature of right, duty, authority, act, cause, and interests. This of course is true, but it is equally true that every part of substantive law is a part of jurisprudence. The objection overreaches itself. You cannot get away from jurisprudence while working with the subject matter of jurisprudence. There is this

difference, however, between the teaching of Jurisprudence and the teaching of Legal Liability. In the former the emphasis is upon the philosophy of law and the legal subject matter is used by way of illustration and argument; but in the latter the subject matter is of first importance and the social and philosophic backgrounds are utilized, as to my mind they should always be utilized, for finding and developing the reasons why the law is as it is. We are not teaching jurisprudence with substantive law as illustrative material, but we are teaching substantive law, with the philosophy of law as a reason when reasons are demanded. That is, we are not questioning the validity of the foundations of the entire legal ordering of society, but we are taking the substantive law as it is and trying to see how it is connected with this legal ordering. And, again let me say, both substantive law and the philosophy of law are simply means to an end, *i. e.*, getting the student to *think his problems through*.

Summing up then, we can say that the scope of the course in legal liability is the definition of certain legal terms, rules, principles and standards; the utilization of these definitions as working tools for the development of the study of substantive law; and methods of reasoning on legal subjects which will help develop thinking powers of the students. The object of the course is to teach methods of approach to legal problems; to stimulate mental functioning; and to bridge the gap existing between pre-legal and legal studies.

In conclusion one must frankly raise this question; Does the course in legal liability actually do all I have claimed for it? My answer cannot be an absolute one. My experience is very limited and my data very meagre. But such as they are, this tentative, undogmatic conclusion is justified. Those men who have studied legal liability intensively and hard approach their other courses with a greater degree of understanding of what their problems are, with

more power to analyze the facts presented to them, with greater ability to distinguish between essentials and unessentials, with a keener realization of the need for accurate thinking, and a greater willingness to work on the cases, instead of waiting on the professor, than those who have not had this intensive training. It may be urged that it is the function of every course and every instructor to give this intensive mental stimulation. The answer is that all courses and all instructors do not do this. The old saw holds true in teaching as well as politics; "Everybody's business is nobody's business." There should be one course definitely set aside to do this much-needed thing, and one instructor, who is especially fitted by temperament and training to do this work, definitely saddled with that responsibility. The course I think, is the course in Legal Liability; the instructor should be a devotee of sociological jurisprudence.

ALBERT LEVITT.

Washington, D. C.

EVIDENCE—CARBON COPIES.

MARTIN & LANIER PAINT CO. v. DANIELS.

108 S. E. 246.

Court of Appeals of Georgia, Division No. 1,
July 26, 1921.

Duplicate or carbon copies of letters made by the same pencil at the same time are not "copies," but duplicate originals, and could be introduced in evidence without notice to produce.

Upon the call of the case for trial, counsel for the plaintiff company, in response to a notice from the defendant to produce certain letters alleged to have been mailed to the plaintiff, read affidavits from all the partners of the plaintiff company showing that no such letters had ever been received by them or the company. Subsequently, upon the trial, the defendant was permitted, over the plaintiff's objection, to prove that he had written such letters to the plaintiff company, and had properly addressed and stamped the envelopes and placed them in the post office; that his return ad-

dress was upon the envelopes, and that the letters had never been returned to him; that the letters which he (the defendant) held in his hands were duplicate or carbon copies of the letters mailed to the plaintiff company—that they were made by the same pencil at the same time. The plaintiff objected to this evidence, and also to the introduction of the letters themselves, on the grounds that the originals of the letters had not been sufficiently accounted for to authorize the introduction of secondary evidence, and that the evidence was irrelevant and immaterial, since the uncontradicted affidavits of all the members of the plaintiff company, which were read in response to the notice to produce the letters, showed that the letters had never been received by the company, and therefore the presumption that they had been received was completely rebutted. Another ground of objection to one of the letters was that it countermanded the order for the goods in question, which order was not subject to countermand. These grounds were properly overruled, for the following reasons:

First, the letters admitted in evidence were not copies, but were "duplicate originals," and could have been introduced in evidence without any notice "to produce." *Bowman & Tarp-ley v. Atlantic Ice & Coal Co.*, 19 Ga. App. 115 (2), 117, 91 S. E. 215, and citations.

Second, the affidavits of the members of the plaintiff company, read in response to the notice to produce, were not admissible evidence, and were not put in evidence during the trial of the case, and were properly disregarded by the court.

Third, the fact that one of the letters countermanded the order which was not subject to countermand did not render the letter inadmissible. The plaintiff was suing upon an open account, and while the order for the goods sold provided that it was not subject to countermand, yet if the defendant did in fact countermand it before the goods were shipped, while this would not relieve him from liability, the plaintiff could not maintain an action upon an open account for goods sold and delivered, but would have to sue for a breach of the contract.

The evidence authorized a finding that the goods shipped to the defendant were not the goods ordered by him, and the verdict in his favor was supported by the evidence, and the court did not err in refusing to grant a new trial.

Judgment affirmed.

NOTE—Admissibility in Evidence of Carbon Copies as Duplicate Originals.—In the case of In-

ternational Harvester v. Elfstrom, 101 Minn. 263, 112 N. W. 252, 12 L. R. A. (N. S.) 343, it is held that the different numbers or impressions of a writing produced by placing carbon paper between sheets of paper and writing upon the exposed surface are duplicate originals and either may be introduced in evidence without accounting for the non-production of the other.

Two papers of loss, simultaneously prepared, one being mailed to the insurance company and the other retained by the insured, were held to be of equal dignity in *Catron v. German Insurance Company*, 67 Mo. App. 544. Likewise, in *Wright v. Chicago, B. & Q. R. Company*, 118 Mo. App. 392, 94 S. W. 555, it was declared that a carbon copy of tickets showing the weights of cattle shipped, made at one writing of the weight upon the paper ticket, was practically an original, and that there could be no objection to receiving it as evidence.

In *Virginia-Carolina Chemical Company v. Knight*, 106 Va. 674, 56 S. E. 725, a copy of an accident report, which was one of three, made at the same time by the same impression of the copying pencil, was regarded as a triplicate original.

The same rule was applied to a carbon copy of a notice to quit, made on a typewriter at the same time as the original, signed by the same persons and in every respect an exact duplicate, one of which was retained and the other served on the tenant. The one retained, it was held, could be offered in evidence without notice to produce the one delivered. *Cole v. Ellwood Power Company*, 216 Pa. 283, 65 Atl. 678.

Where a claim for damages against a city was made in duplicate on a typewriter, the copy retained by claimant's attorney was admissible in evidence without notice to produce the other, although the duplicates were signed by the attorney with pen and ink. *Gainesville v. White*, Ga. App., 107 S. E. 571.

Notices of a demand of possession of land, prepared at the same time, and all alike except that three of them were addressed to different tenants and the fourth retained by the party who prepared them, were held to be all original duplicate papers. *Westbrook v. Fulton*, 79 Ala. 510. *Gardner v. Everhart*, 82 Ill. 316.

Letter press copies of documents do not fall within this rule, however, and are not admissible as originals. Note in 12 L. R. A. (N. S.) 344.

In *Gordon v. Christenson*, 188 N. Y. Supp. 135, it is held that defendant may prove his letter to plaintiff by a copy thereof only after notice to plaintiff to produce the original.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS—WHEN AND WHERE TO BE HELD.

California—Riverside, Oct. 20 and 21, 1921.

Kansas—Topeka, Nov. 21 and 22, 1921.

Nebraska—Omaha, Dec. 29 and 30, 1921.

Oregon—Portland, Nov. 15 and 16, 1921.

Rhode Island—Providence, Dec. 15, 1921.

BOOKS RECEIVED.

Treaties and Agreements With and Concerning China, 1894-1919. A collection of state papers, private agreements, and other documents, in reference to the rights and obligations of the Chinese Government in relation to foreign powers, and in reference to the interrelation of those powers in respect to China, during the period from the Sino-Japanese War to the conclusion of the World War of 1914-1919. Compiled and edited by John V. A. McMurray, Counselor of Embassy of the United States, assigned to Tokyo; lately Secretary of the American Legation at Peking. Volume I, Manchu Period (1894-1911). Volume II, Republican Period (1912-1919). New York, 1921.

The Proceedings of The Hague Peace Conference. Translation of the Official Texts. Prepared in the Division of International Law of the Carnegie Endowment for International Peace, under the supervision of James Brown Scott. Volume I, Plenary Meetings of the Conference. 1920. Volume II, Meetings of the First Commission. 1921. New York.

The United States of America: A Study in International Organization. By James Brown Scott, Technical Delegate of the United States to the Second Hague Peace Conference, 1907; Technical Delegate of the United States to the Peace Conference at Paris, 1919. New York. 1920.

Government Control and Operation of Industry in Great Britain and the United States During the World War. By Charles Whiting Baker, C. E. New York, 1921.

World Peace, or Principles of International Law in Their Application to Efforts for the Preservation of the Peace of the World. By Fred H. Aldrich. Lectures Delivered Before the Detroit College of Law. 1921.

Economic and Social History of the World War (British Series) by James T. Shotwell, Ph. D., General Editor, with the collaboration of the British Editorial Board of the Carnegie Endowment for International Peace. 1921.

HUMOR OF THE LAW.

A chaplain was noted for his ready wit.

While traveling on a steamboat a notorious sharper who wished to get into his good graces said: "Father, I should like very much to hear one of your sermons."

"Well," said the clergyman, "you could have heard me last Sunday if you had been where you should have been."

"Where was that, pray?"

"In the county jail."

Lawyer (examining witness). Do you drink intoxicating liquor?

Witness (indignantly). Sir, that's my business!

Lawyer (quietly). Have you any other business?—*Scalper*.

First Autoist—"I thought you said if I were sociable with the judge I could get off?"

Second Autoist—"Were you?"

First Autoist—"Yes. I said 'Good Morning, Judge, how are you today?' and he replied, 'Fine—twenty-five dollars.'"

Cop: "Come on! What's the matter with you?"

Truck Driver: "I'm well, but me engine's dead."

There was an amusing ending of a civil case tried in the county court. It was an appeal case and on one side was a testy lawyer and on the other a number of inexperienced ones. The arguments on both sides had been heard and the case closed for judgment.

Suddenly one of the inexperienced lawyers got up and addressed the court once more. The testy lawyer stood for it a moment, but losing patience, he also arose and addressed the court in this wise:

"Your honor, I would beg with all respect to point out to the court that my learned friend opposite is entirely out of order in addressing the court, and if I may be permitted to say so, the court has no right to be listening to him."

The court, who at the time was writing, put his head out in a belligerent way and said: "Mr. Smith, it is a great piece of impertinence on your part to assume that the court is listening to him."—*Los Angeles Times*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Adverse Possession**—Interest in Land.—Where plaintiff's father conveyed land to his wife, and after her death a mortgage thereon was foreclosed and the land sold to the assignee of the judgment creditor, who then deeded it to plaintiff's brother, the latter continuing in possession with color of title and asserting his claim of right for nearly 22 years, all of which was known to plaintiff and her father, plaintiff's right to an interest as an heir either of her mother or father was barred by the 10-year statute of limitations.—*Barth v. Severson*, Iowa, 183 N. W. 617.

2. **Bankruptcy**—Chattels.—Where the stock in trade of a bankrupt was collusively sold under a chattel mortgage, which was preferential and invalid under the Bankruptcy Law, to a representative of the mortgagee, who resold it to a bona fide purchaser for value, the latter held to have acquired a good title; but the seller and mortgagee held liable to the bankrupt's trustee for the amount received therefor.—*Gray v. Breslow*, U. S. C. C. A., 273 Fed. 626.

3. **Insurance Policies**—Insurance policies on the life of a bankrupt, payable to his wife, but reserving to him the absolute right to change the beneficiary, so that the bankrupt had full control over the policies, are assets of his estate, and the trustee is entitled to receive the surrender value thereof.—*In re Jens*, U. S. D. C., 273 Fed. 606.

4. **Jurisdiction**—Where there were more than 100 separate damage claims against a bankrupt corporation, all arising from the same transaction, on some of which actions had been brought in the state courts, and on all of which liability depended on the same facts, the bankrupt held entitled to an injunction restraining prosecution of suits on such claims until it could obtain its discharge, and its trustee held entitled to an order requiring adjudication of the claims in the bankruptcy court where they could be consolidated for trial as to liability.—*In re People's Warehouse Co.*, U. S. D. C., 273 Fed. 611.

5. **Payment of Check**—In a prosecution based on section 553 of the Penal Code of 1910, it is a good defense for the accused to show that payment of a bank check, given in payment for farm, orchard, or dairy products, was refused by the drawee bank, when presented for payment, solely because, after the giving of the check and prior to its presentation for payment,

tary bankruptcy, and his funds in the bank, which were sufficient to pay the check, were seized by a receiver appointed to take charge of the bankrupt's property.—*Oetgen v. State*, Ga., 107 S. E. 885.

6. **Banks and Banking**—Corporate Existence.—Even if the General Assembly had no authority in 1870 to enact a law incorporating two separate and distinct corporations in one act, yet where such an association actually organized and existed under such colorable authority, and used the rights claimed to be conferred by such charter, and did business under it as a corporate body, the directors of such organization, who acted as such, will be estopped from denying the corporate existence of such organization as against the corporation itself, its receiver, and third persons who have dealt with it as a corporation.—*Council v. Brown*, Ga., 107 S. E. 867.

7. **Forgery**—Where the by-laws of a savings bank provided that it should not be liable for payments made to any person who should produce the deposit book, and that withdrawals might be made by the depositor personally or by written order, payment on written order to one producing the deposit book exonerates the bank from liability to a depositor, provided the bank in making such payment was in the exercise of ordinary care.—*Ninoff v. Hazel Green State Bank*, Wis., 183 N. W. 673.

8. **Joint Deposit**—Where husband and wife made a deposit in a bank, signing memorandum stating that they were to hold "as joint tenants, and not tenants in common" and there was an entry in bank book that they were to "hold as joint tenants and not as tenants in common, the survivor to take," a contract was created between the two depositors and the bank, which gave the survivor the right to take.—*Commonwealth Trust Co. v. Grobel*, N. J., 114 Atl. 353.

9. **Stockholder's Liability**—The amendment of the articles of incorporation of a bank so as to change its name and increase its capital stock does not change the identity of the corporation, so as to relieve a stockholder, who subscribed to shares of the original issue, and who opposed the amendments, from his liability on the stock held by him.—*German-American Mercantile Bank v. Foster*, Wash., 199 Pac. 314.

10. **Bills and Notes**—Holder in Due Course.—Negotiable Instrument Law Ill. §§ 65, 66, providing that indorsers warrant the genuineness and validity of the instrument to all subsequent holders in due course, do not apply to the drawee of a draft, to whom it is presented for payment, who does not become by payment a "holder in due course."—*American Hominy Co. v. Millikin Nat. Bank*, U. S. D. C., 273 Fed. 550.

11. **Bridges**—Tolls.—The right to exact tolls of the public for the privilege of crossing a public bridge must be conferred by statute or it does not exist.—*Ft. Smith Light & Traction Co. v. Williams*, Ark., 231 S. W. 891.

12. **Brokers**—Authority.—Authority of broker to sell land is not revoked by a letter mailed to, but never received by, him.—*McWilliams v. Reith*, La., 88 So. 913.

13. **Dividing Commissions**—An agreement by a broker to divide his commissions with the purchaser of real estate does not affect his right to recover, though the principal does not know it, nor will his agreement to divide with another broker, who is not connected with the other side.—*Christian v. Dunavent*, Tex., 232 S. W. 875.

14. **Carriers of Goods**—Voluntary Reduction of Rate.—A voluntary reduction of a rate by a carrier would not make the prior rate unlawful, unreasonable, or discriminatory and the basis for an action for damages.—*Doney v. Northern Pac. Ry. Co.*, Mont., 199 Pac. 433.

15. **Carriers of Passengers**—Alighting.—A public street in a city, at a point where a street car stops for passengers to alight is not to be regarded as a passenger station, in determining the duty of a street railway company towards its passengers, and a passenger, who stepped on a banana peel and fell, cannot recover.—*Thompson v. Greenville Traction Co.*, S. C., 107 S. E. 911.

16. **Ordinary Care**—Where a defendant equipped steps in a station giving access to trains with safety tread, which was supposed

to afford a firm footing even though wet, a passenger, who slipped on a step which had become wet presumably from the wet or muddy shoes and dripping umbrellas of the preceding passengers, cannot recover from defendant; it having exercised ordinary care.—*Williams v. Kansas City Terminal Ry. Co.*, Mo., 231 S. W. 954.

17. **Constitutional Act**.—Due Process.—The manufacture of cement by the state held the carrying out of a public purpose in view of the facts shown and facts judicially noticed as to the use of cement, its shortage, etc., and hence Laws 1919, c. 324, authorizing the creation of a state cement commission and the issuance of bonds for the establishment of plants for the manufacture of cement, does not deprive taxpayers of their property without due process of law.—*Eakin v. South Dakota State Cement Commission*, S. D., 193 N. W. 651.

18. **Due Process**.—The provisions of chapter 146, Code of 1906, and amendments thereto, are not suspended by Act Cong. Aug. 10, 1917, commonly called the Lever Act, even if this act is valid, and the enforcement of the provisions of the said Anti-Trust Act against insurance companies does not deprive them of the equal protection of the law, nor deprive them of property without due process of law.—*Nugent & Pullen v. Robertson*, Miss., 88 So. 895.

19. **Equal Protection**.—Laws 1920, c. 16, enacted to meet the housing emergency resulting from the war, but which was to apply only to counties having a population of 250,000 or more, denies equal protection of the laws to landlords in such counties, since the housing emergency existed also in other counties, and the mere fact that more people were affected thereby in a large county does not furnish reasonable ground for separate legislation for such counties.—*State v. Railroad Commission*, Wis., 183 N. W. 687.

20. **Federal and State Laws**.—The first ten amendments to the United States Constitution are restrictions solely on the powers of the federal government, and a state law cannot successfully be attacked as violative of Const. U. S. Amend. 5.—*Joslin Mfg. Co. v. Clarke*, R. I., 114 Atl. 185.

21. **State Insurance**.—Inasmuch as the state has the power to require all employers to insure in the state insurance fund and not leave it optional, as under the Workmen's Compensation Law, an employer exercising such option cannot complain of the conditions upon which the option is granted as being unconstitutional because discriminatory.—*Salt Lake City v. Industrial Commission*, Utah, 199 Pac. 152.

22. **Corporations**.—Compensation of Directors.—Where directors of a new corporation secured a lease of land for its factory, supervised the construction, etc., they were not entitled to vote themselves shares of stock as compensation for such services were among the lines of the duties of the directorate, which are those of management and supervision; the details of the business being delegated to inferior agents.—*Cahall v. Lofland*, Del., 114 Atl. 224.

23. **Profit on Resale of Bonds**.—Where an officer of a corporation purchased from the company 50 \$1,000 bonds at par, and later sold back to the company 43 of the bonds so purchased at an increased price of \$50 a bond, and still later sold back the remaining 7 bonds at the same price, he cannot be permitted to enjoy the fruits of such a contract with the company he represented against its will exercised within reasonable time, and the contractual profits secured by him through the purchase and resale of the bonds must be returned to the company unless the contract of resale has been intelligently ratified by a stockholders' meeting, or the company's claim has not been asserted within a reasonable time.—*Busch v. Riddle*, N. J., 114 Atl. 348.

24. **Covenants**.—Building Restrictions.—Six double buildings sought to be constructed on a lot having a frontage of 125 feet and a depth of 155 feet held to violate restriction in deed reciting that not more than one dwelling house might be constructed on a 50-foot front of the lot.—*Morrison v. Hess*, Mo., 231 S. W. 997.

25. **Damages**.—Measure of.—Plaintiff, a girl of 10, injured by defendant street railroad's car,

if entitled to recover, was entitled to recover a sum reasonably compensating her for her injuries, including pain and suffering in the past, and such as might come to her in the future, and for any permanent injuries received; while her father, suing for loss of services, was entitled to reasonable compensation for expenses for professional and hospital services in the care and attention given his daughter.—*Sund v. Wilmington & P. Traction Co.*, Del., 114 Atl. 281.

26. **Deeds**.—Survivorship.—Where a husband and his wife some time before the wife's death, each executed a deed to the other and placed them in their safe deposit box on the understanding that on the death of one the survivor would take all the property by the deed of the one dying, and the deed of the survivor would not take effect, the transaction was wholly ineffective.—*Miller v. Brode*, Cal., 199 Pac. 531.

27. **Frauds, Statute of**.—Parol Contract.—Where a contract for the sale of land was not in writing, a note executed in aid of such contract was wanting in consideration, and is not enforceable.—*Davis v. Dilbeck*, Tex., 232 S. W. 927.

28. **Insurance**.—"Arrears".—A member of a fraternal benefit association, who had the option of paying his dues weekly, monthly, or quarterly, is not in arrears on the payment of dues until the end of the quarter, within a provision of the constitution prohibiting payment of benefits where the member is three months or over in arrears for weekly dues, since "arrears" is defined as that which is behind in payment, or which remains unpaid, though due, and therefore the association is liable on the certificate, where the member died within one month after the expiration of the first quarter for which no payment was made, at which time he was then only 30 days in arrears.—*Independent Council No. 2, Etc. v. Lucas*, D. C., 273 Fed. 320.

29. **Burden of Proof**.—In an action by assignee of beneficiary under a life policy, where through concessions made by defendant's attorney plaintiff made out a prima facie case, court erred in dismissing by reason of a condition in the policy requiring the production thereof or a legal excuse for its non-production, where there was no legal proof as to what the provisions of the policy were in the respect named, for it would seem that, if defendant relied on a dismissal for non-compliance with a condition precedent to a recovery contained in the policy, it should have proven the condition and plaintiff's failure to perform it.—*Casey v. Metropolitan Life Ins. Co.*, N. Y., 189 N. Y. S. 70.

30. **By-Laws**.—A fraternal benefit society, which has issued certificates on applications by which insured agreed to be bound by the society's by-laws then in force and to be thereafter enacted, can make by-laws subsequently enacted, which are not in themselves unreasonable or against express law or public policy, applicable to such existing certificates.—*Bennett v. Modern Woodmen of America*, Cal., 199 Pac. 343.

31. **Payment of Benefits**.—Where the statute under which a fraternal benefit association was organized prohibited the payment of the benefits except to designated classes, including the wife of insured, the divorce of the wife designated as beneficiary precludes the payment of the benefits to her, though it would not have that effect if the statute merely prohibited the issuance of the certificate with benefits payable to others than the designated classes.—*Thomas v. Locomotive Engineers' Mutual Life & Accident Ins. Ass'n*, Iowa, 183 N. W. 628.

32. **Removal of Goods**.—Where, when defendant company issued its fourth insurance policy on plaintiff's cotton, its agent did not know that the cotton had been removed to the compress, and wrote the policy at a lesser rate than he would if he had so known, and the plaintiff, without reading it, put it away among his papers, and the cotton was destroyed, it was error to render a judgment against the defendant for the insurance, for, on renewal, the insurer may assume that the subject-matter and its location are as described in the former contract, and insured could not excuse his failure to notify the insurer of the change of location on the ground that he did not know a change

of locations affected the risk, as that is matter too obvious to be overlooked by a person of ordinary prudence.—*National Liberty Ins. Co. v. Kelly, Tex.*, 232 S. W. 895.

33.—**Suicide Clause.**—A clause against liability of insurer in the case of suicide within one year from the issuance of the policy, which is not prohibited by statute in the state in which the parties resided and where the policy was made and delivered and the insured died, is binding, since the policy is governed by the law of that state.—*Parker v. Aetna Life Ins. Co., Mo.*, 232 S. W. 708.

34.—**Waiver of Limitation.**—Where an insurance certificate required action to be brought within a year after death, and insurer, which had denied liability on the theory that an assessment had not been paid, considerably after the expiration of a year, at the demand of the beneficiary's attorney, furnished blanks for proofs of death, stating, in a letter written by its general counsel, that the deceased was not a member of the insurer at the time of his death because of failure to pay assessment, such letter was a waiver of the defense of limitations.—*Hay v. Bankers' Life Co., Mo.*, 231 S. W. 1035.

35.—**Intoxicating Liquors.**—Inference.—In the absence of evidence to the contrary, it may be inferred that a liquor called for and delivered and paid for as whisky is whisky, and therefore intoxicating liquor.—*Frazier v. State, Ga.*, 107 S. E. 896.

36.—**"Possession."**—In prosecution for unlawfully possessing intoxicating liquor, an instruction that the word "possess" means the exercise of actual control, care, and management of the property is correct, the ownership of the property not being an essential element of its possession.—*Thomas v. State, Tex.*, 232 S. W. 826.

37.—**State Laws.**—A city has power to regulate the possession of intoxicating liquors in a manner not in conflict with the National Prohibition Act or the laws of the state, and may authorize the search of a private dwelling for liquors unlawfully possessed, where not prohibited by the state laws, though National Prohibition Act, § 25, provides that no search warrant shall issue thereunder to search any private dwelling.—*United States v. Viess, U. S. D. C.*, 273 Fed. 279.

38.—**Landlord and Tenant.**—Injury to Lessee.—A wife was not entitled to recover under Code, art. 2717, for personal injuries received owing to the rottenness of a window frame of a house leased by defendant to her husband, in which they lived; the appliance for holding up the sash giving way, and the sash falling upon her hand and crushing it, in view of article 2716, the husband, and not the lessor, being at fault.—*Harris v. Tennis, La.*, 88 So. 912.

39.—**Provisions of Lease.**—Where lease provided, "if the landlord is requested to furnish electric current to the tenant for lighting purposes and the landlord shall furnish such current, that the same shall be paid for by the tenant," the tenant could not recover for failure to supply electric current, in the absence of a showing that tenant could not obtain electricity with or without a separate meter for herself.—*Curry v. Coyle, N. Y.*, 189 N. Y. S. 65.

40.—**"Structural Addition."**—An oil separator was a "structural addition" to a leased garage, within the provision of the lease that the tenant should make such repairs and alterations as should be required by any of the departments or bureaus of the city of New York, except that it should not be required to make structural additions.—*New York Motor Truck Sales Corp. v. Corse, N. Y.*, 189 N. Y. S. 94.

41.—**Unreasonable Rent.**—Fact that tenant had paid the rent for the four preceding months pursuant to the lease did not prevent his taking advantage of the plea that rent demanded for the month in question was unreasonable, pursuant to the recent statutes known as the Housing Laws.—*Schechter v. Traconis, N. Y.*, 189 N. Y. S. 144.

42.—**Master and Servant.**—Authority of Employee.—The test to determine whether a fellow employee of an injured servant was a vice principal is the power to exercise superintendence the drawer of the check was placed in involun-

and control, and it is immaterial whether the fellow employee had authority to employ and discharge.—*Barney v. Anderson, Wash.*, 199 Pac. 452.

43.—**Electric Shock.**—Where it is shown that the death of an employee was caused by an electric shock, this is sufficient under the doctrine of *res ipsa loquitur* to raise the inference that the wire containing the current was not safe, and to raise a *prima facie* presumption that the employer was negligent.—*Neary v. Georgia Public Service Co., Ga.*, 107 S. E. 893.

44.—**Ensuing Disease.**—Where a workman receives a personal injury from an accident arising out of and in the course of his employment, and a disease ensues which, but for the accident, would not have ensued and which disease causes his death, this justifies a finding that death was in fact the result of the injury and was by accident within the meaning of section 2 of the Workmen's Compensation Act, even though it is not the natural result of the injury.—*Geizel v. Regina Co., N. J.*, 114 Atl. 328.

45.—**Fellow Servant.**—The stevedore, who was not a member of the crew of a lighter, but was employed to unload her and paid by the hour, is not a fellow servant of the captain, and can recover for injuries caused by the captain's negligence.—*The Howell, U. S. C. C. A.*, 273 Fed. 513.

46.—**Recovery Under State Law.**—Recovery was properly allowed in a state court under a complaint setting forth a cause of action under the federal Employers' Liability Act, and also a cause of action under the state laws, where defendant railroad by its answer denied that plaintiff was in its employment and alleged and proved that plaintiff was an employee of an independent contractor, as against the claim that defendant, being a non-resident corporation, was deprived of its right to remove the cause into the federal court; there being no claim of a fraudulent intent on the part of plaintiff to deprive defendant of the right of removal.—*Polluck v. Minneapolis & St. L. R. Co., S. D.*, 183 N. W. 859.

47.—**Scope of Employment.**—In an action against a city for injuries to plaintiff from an assault by the city's employee, sent to the building of which plaintiff had charge to wire it for electricity and set meters therein, evidence that the assault was committed by the city's employee while endeavoring to open a door against plaintiff's resistance, for the purpose of going on with his work, justified a finding that the assault was committed in the course of the city employee's employment.—*Ruppe v. City of Los Angeles, Cal.*, 199 Pac. 496.

48.—**Monopolies.**—Anti-Trust Law.—One insurance company, in the absence of an agreement, could not violate this law by independently adopting as its rate of insurance the advisory rate of this bureau.—*Miller v. Fidelity Union Fire Ins. Co., Miss.*, 88 So. 711.

49.—**"Commodities."**—Within Rev. St. 1911, art. 7798, making it a conspiracy in restraint of trade to make an agreement to refuse to buy or sell any article of merchandise, produce or commodity, cuts to be used for advertising purposes in connection with advertising service, and which were not intended to be bought for resale, since their value would be destroyed by general use in the community, are not commodities, so that a contract, forbidding the sale of such cuts by the buyer, is not a violation of the Anti-Trust Act.—*Schow Bros. v. Adva-Talks Co., Tex.*, 232 S. W. 883.

50.—**Municipal Corporations.**—Damage by Flood.—In an action against a city to recover damages resulting to building and land from an overflow of a creek caused by negligence of city in maintaining improper culverts, the damage to the building occurring in one year and the damage to the land the following year, held that there was no merit to a contention that plaintiff ought not to be allowed to recover anything for damage to land itself because he did not, after the first flood had thrown down the walls of the building, take steps to prevent further damage by rebuilding a wall along the water's edge; such contention being a misconception of the general rule that a plaintiff must do what he can reasonably, to minimize the dam-

age which he claims for a breach of contract or for a tort, since plaintiff was not bound to anticipate and provide against future wrong.—*City of Richmond v. Cheatwood*, Va., 107 S. E. 831.

51.—"Incidental Work."—Under Laws 1913, c. 89, § 3, as amended by Laws 1915, c. 142, § 2, providing that, before creating any special improvement district, the city council shall pass a resolution of intention, stating the general character of the improvements to be made, a resolution of intention to create such a district for the purpose of paving, with the necessary excavations cutting, filling, etc., and "incidental work," was an insufficient description of the general character of improvements, which included a reduction in the street widths, new parking and curbing, storm sewers, etc.; large portions of territory in the district being already included in parking, curbing, and sewer districts.—*Evans v. City of Helena*, Mont., 199 Pac. 445.

52.—Uncertainty of Ordinance.—An ordinance fixing a license fee for practicing law, based on gross annual business, was not void for uncertainty, though not expressly referable to the previous year; its administrative provisions showing that reference could have been only to a gross annual income already determined and ascertainable.—*Anderson v. City of Birmingham*, Ala., 88 So. 900.

53. Negligence—Reasonable Care.—Where defendant's own requested charge conceded that plaintiff was a licensee it was proper to modify that portion of the charge which stated that defendant's only duty was not to willfully or wantonly injure him, and impose on defendant the duty of reasonable care.—*McAllister v. Thomas & Howard Co.*, S. C., 108 S. E. 94.

54. Physicians and Surgeons—Qualifications.—The regulation of the department of registration and education that an applicant under the Medical Practice Act for license to practice chiropractic must produce letters of recommendation from two reputable medical men or osteopathic physicians is unreasonable and discriminatory.—*People v. Love*, Ill., 131 N. E. 809.

55. Railroads—Scope of Station Agent's Employment.—Where plaintiff went to defendant's railroad station for the purpose of sending a telegraphic message, the station agent being the operator, and an altercation and assault resulted when the demand of the agent that plaintiff dismiss an action which as attorney he had brought against the railroad company was refused, defendant was not responsible, as such demand was not within the scope of the agent's employment.—*Payne v. Tisdale*, Tex., 232 S. W. 331.

56. Reformation of Instruments—Mutual Mistake.—Though for reformation of a deed or mortgage for mutual mistake in description, unmixed with fraud, complainant must have been free from gross or culpable negligence, he need not show he was entirely free from fault.—*Burch v. Driver*, Ala., 88 So. 902.

57. Sales—Delivery.—On motion for judgment by the buyer of rawhide shoe laces for the seller's refusal to deliver, instruction that, if the jury believed from the evidence that defendant seller agreed to fill plaintiff buyer's orders at the rate of 50,000 laces a week, beginning at a specified time, and failed to make deliveries as agreed, plaintiff buyer was justified in cancelling the orders, the jury should find for him, and assess his damages in conformity with the directions of the court, held not erroneous.—*Richmond Leather Mfg. Co. v. Fawcett*, Va., 107 S. E. 801.

58.—Destruction of Goods.—Where agreement was not to sell or convey a particular car of potatoes, but a car of any potatoes answering a certain description, containing no condition, expressed or implied, destruction of a car of potatoes in shipment did not excuse non-delivery, and seller was liable for damages.—*Cohen v. Morneault*, Me., 114 Atl. 307.

59.—Misrepresentation.—In case of misrepresentation concerning the identity of one with whom the seller is asked to deal, but who in fact is not present, because non-existent, no title passes; the only intent of the seller being

to pass title to the absent entity, in the instant case a corporation which in fact did not exist.—*Cohen v. Savoy Restaurant*, N. Y., 189 N. Y. S. 71.

60.—Partial Shipment.—Where some of the unrelated goods ordered by a buyer could not be found on the market, and the vessel had not sufficient space for others, the buyer was not excused by the failure to ship such goods from paying for those shipped; the seller not having been instructed to ship all or none of the goods.—*H. T. Cottam & Co. v. Moises*, La., 88 So. 916.

61. Street Railroads—Negligence.—Street railroad held liable for injuries to fingers of a passenger, caught in the crevice along hinges of a door inclosing electric switches, when the guard shut the door after having turned on the switches, though his fingers were not in crevice when door was opened immediately prior thereto; the railroad being required either to so construct the door that passengers could not catch their fingers in such crevice, or to see to it that the guard did not shut door when passengers might be endangered thereby.—*Grafstein v. Interborough R. Co.*, N. Y., 189 N. Y. S. 68.

62. Taxation—Foreign Corporations.—Under Act June 2, 1915, as to taxation of foreign corporations, a foreign corporation which has within the state a number of cash registers which it has delivered to residents of the state under contracts which are leases with option to buy is liable to be taxed upon the value of such cash registers, though the real object of the transaction was a sale of the machines, as the situs of the property is in Pennsylvania, and represents an investment therein of the capital of the company doing business in the state.—*Commonwealth v. National Cash Register Co.*, Pa., 114 Atl. 366.

63. Time—Extension.—Order extending defendant's time until September 20th to file exceptions to verdict, motion in arrest of judgment, and for new trial gave defendant a period including September 20th for such filing; "until" being inclusive in meaning unless a contrary intent is shown.—*Henderson v. Edwards*, Iowa, 183 N. W. 583.

64. Wills—Construction.—Under a husband's will, giving all his possessions to his wife to be used according to her judgment and will, if she died without having made a will, possession to go to another on condition she provide for her mother, the wife was given the right to use or dispose of the property in any way she saw fit, but, if she died without disposing of it, it was to go to the other, charged with support of the mother.—*Fowler v. Ladd*, N. H., 114 Atl. 271.

65.—Residuary Devise.—The devise of all the residue of a testator's estate to his wife, after the payment of debts and the setting aside of specific bequests to her was not specific because all the real estate of which testator died seized was owned by him at the time of the execution of the will, the rule at common law that the will spoke as of the date of its execution not being in force in Iowa, where the will speaks as of the date of the testator's death.—In re *McAllister's Estate*, Iowa, 183 N. W. 596.

66. Witnesses—Parol Evidence.—Where a contract is partly in writing and partly in parol, death stops the parol evidence, and the writing stands.—*Nickles v. Miller*, S. C., 108 S. E. 90.

67.—Personal Knowledge.—In actions between a living party and the representative of a deceased person, except in the case of bulky articles and services of such nature as to require assistance in delivery or performance, the person making the entries in regular books, whether he be the living party or a clerk, servant, or agent, if he has knowledge of the fact, may make oath to the delivery or the performance of the services.—*Mansfield v. Gushee*, Me., 114 Atl. 296.

68.—Privileged Information.—An accidental injury to the eye of an employee, for treatment for which the employee consulted a physician, is a "disease," within Civ. Code Ariz. 1913, par. 1677, subd. 6, making privileged information obtained by a physician of a patient suffering from any disease.—*Phelps Dodge Corporation v. Guerrero*, U. S. C. C. A., 273 Fed. 415.

Central Law Journal.

St. Louis, Mo., October 28, 1921.

ATTORNEY GENERAL DAUGHERTY'S SIX RULES FOR HANDLING LABOR DISPUTES.

At the American Bar Association meeting in Cincinnati, Attorney General Daugherty discussed the general subject of Law Enforcement. His address was well received and none of his suggestions were more interesting than the six rules he laid down for handling labor disputes. We give them verbatim:

First—It is an undisputed fact that the public have a right to know what the quarrel is about in every actual or threatened strike or lockout and similar controversies.

Second—There should be some definite agencies in government for ascertaining these facts fully and making an impartial finding by those specially qualified both by temperament and training to do this particular kind of work; and such finding should be reported so that it will be a reliable source of knowledge to which students and publicists and statesmen can resort.

Third—Compulsory jurisdiction over these two factors to compel them to submit to an inquiry of this sort is not only desirable but just.

Fourth—At present our study of this question has not been sufficiently thorough to warrant legislation compelling the acceptance of such findings by the parties thereto. Therefore, the jurisdiction of the proper agency should be obligatory upon the parties to submit to the investigation; the acceptance of the finding by the parties should be voluntary.

Fifth—The experience of the past shows that in most cases full, accurate, reliable publicity has been sufficient to compel an adjustment of these cases. Public sentiment is a controlling factor and it is important, in justice to both of the parties, that it should depend upon something more accurate than successful propaganda.

Sixth—In the course of time knowledge of the nature and causes of these controversies derived in this way may crystallize public sentiment to the extent that laws can be enacted making such controversies impossible.

Society is vitally interested in the proper solution of this question. When some such plan as I have suggested shall have been put in operation then we will have a more intelligent basis upon which to enact compulsory legislation upon this subject.

The Attorney General has stated the prevailing opinion, both in the profession and among the people. The whole subject of compulsory arbitration of labor disputes was discussed at the recent Conference of Commissioners on Uniform State Laws at Cincinnati, August, 1921, and the Kansas experiment was regarded with more favor than heretofore. It was finally decided to postpone action on a Uniform Industrial Dispute Act until the Supreme Court had passed on the Constitutionality of the Kansas law.

The difficulty that presents itself to us at this time did not exist fifty years ago. It is due to the present day mania for group organization. So long as men acted singly, as individuals, the old forms of executive and judicial administration were sufficient. But when men tied themselves together by solemn oaths and compacts to act together, they became in some cases, as powerful as the government itself, or at least so powerful that the ordinary remedies and processes of law could not solve the problems created when one such group came in conflict with another such group.

But the people are awakening to the danger of these groups. They stared in amazement a few years ago at the prospect of freezing to death while the coal mine owners locked horns with the organized miners' union over some dispute about wages and working conditions. The people then came to the conclusion that all such groups were dangerous to society and must be destroyed or they must be put under control. Two individuals would not be allowed to settle their own differences by staging a prize fight on the public highway and blocking traffic. So the owners of coal mines and their miners, who constitute a mines and their miners, who constitute only a small part of the population of the country, should not be permitted to stage a spec-

tacular strike while the people freeze and starve.

It is just as reasonable for the state to provide a tribunal to settle these disputes as it is to compel individuals to tell their troubles to the judge rather than fight them out on the public highways.

The sixth suggestion of the Attorney General is worthy of special mention. The hesitation felt by lawyers over the creation of an industrial court has been because of the uncertain character of the justiciable issues involved in such controversies.

The nature and causes of industrial disputes are uncertain, and no principles of the common law seem to be applicable thereto. The careful investigation of every such controversy is bringing to light certain conditions caused by our complex social and industrial life, which can be remedied only by regulation and by new laws defining the rights of both the worker and the employer. When the law has crystallized on this point then the Industrial Court will have a fairly clear chart and compass and probably will be a safe boat to travel in.

NOTES OF IMPORTANT DECISIONS.

LACK OF FIDELITY TO CLIENT AS GROUND FOR DISBARMENT.—Clients have sometimes sued their lawyers for negligence or want of skill but rarely have courts, *sua sponte*, directed the Attorney General to bring proceedings to disbar an attorney for negligence in filing a writ of error. But that is what happened in the recent opinion by the Supreme Court of New Jersey in the case of *In re McDermitt*, 114 Atl. 144.

In that case McDermitt was attorney for a defendant indicted for murder. There was a conviction, and on October 4th a judgment of death. An application to the Chancellor for a writ of error out of the Supreme Court was refused. Thereupon McDermitt sued out a writ of error as a writ of right from the Court of Errors and Appeals on November 9, 1920, returnable November 29, 1920. Between the issuance of the writ of error and its return the November term of the Court of Errors and Appeals opened on the 16th day of November. It thereupon became McDermitt's duty, under the

twenty-seventh rule of that court, there not being sufficient time to bring on the hearing at the November term, to apply to the Court of Errors and Appeals on the first day of that term for such order as might be necessary to secure the speedy hearing and determination of the cause. This he failed to do. The prosecutor of the pleas thereupon gave notice to dismiss the writ of error. Regular practice required that it should be dismissed, but, as the case was a capital case, the Court of Errors and Appeals, out of mere grace, examined into the record and heard argument, directing that proceedings be had against the attorney for his neglect.

The question in the case was whether the attorney in this case should be disbarred for failure in his duty to a client in respect to a motion necessary to secure a review of the case on appeal. The Court said it was. In the opinion the court called attention to the fact that McDermitt had been disbarred many years before (63 N. J. Law 476) for retaining money belonging to his client, but he had been afterward restored to the bar. In contrasting the two situations, the Court said:

"In the case referred to, the defendant was disbarred because he obtained money from his clients for which he failed to render any adequate service, and because he retained for his own use money which he received from them for another purpose. In short, he was then disbarred for lack of fidelity to his clients in pecuniary matters only. He is now guilty of lack of fidelity in a matter involving life. He abandoned them when the prisoner was in the very shadows of the electric chair, in the very week fixed for execution. That abandonment was not less culpable because he subsequently resumed his efforts in their behalf under strong pressure from the Court. For counsel to abandon a client at such a crisis is like a soldier deserting in the face of the enemy. Dereliction on the part of attorneys and counselors is not uncommon, but fortunately the most untrustworthy counsel is ordinarily loyal enough to his client, and even the ordinary sense of self-interest urges a lawyer to do the best he can to save his client's life. It is rare that counsel sets his own desire for money above his client's chance of life. We find that McDermitt was guilty of gross dereliction in his duty to his client. We can think of none grosser. If mere unfaithfulness in money matters justified his disbarment in 1899, much more must lack of fidelity in a matter of life and death justify his disbarment in 1921."

The Court evidently thought that McDermitt's failure to perfect his appeal was not a mere oversight but a deliberate attempt to bring pressure to bear on the wife of his client to give him a larger fee. Unless this be true it is hard to believe that the Court would visit upon an attorney such a harsh punishment.

Very rarely will a court disbar an attorney for mere negligence or want of skill. There must be some element of moral turpitude in the offense. Unless that were true not a few honest attorneys would be disbarred for lapses of memory which resulted in injury to their client's cause. While it is clear that in such cases the attorney should be liable civilly for his client's loss, it is not clear that he should forfeit his professional life, unless his failure to do what he ought to have done was deliberate or for some ulterior purpose.

THE ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW.*

The tendency everywhere, in vegetable and animal life, is to revert to original primitive types. In the absence of mental and moral training, the human biped steers constantly and inevitably backward to his cave ancestor.

The average American, while easily aroused and led by passion, willingly bends to the law's behests and looks to it for justice and safety; but when misled by anarchists and demagogues, beset by some great temptation or obsessed by some primeval passion, then the training and influence of ages of civilization disappear.

The average American community, under normalcy, is gentle, well bred, well fed, keeping step, as well as humanity is expected to do, with the law and the prophets; when in the calm, no inexperienced onlooker could ever conceive that it could be lashed into storm.

But when the crisis comes, when swayed by prejudice and passion, when aroused by race clash and antagonism; when deceived by demagogues and shysters; when shocked by some atrocious crime; when threatened by loss of place; when gnawed by famine; when excited by class hatred and distrust; when betrayed by political or religious frenzy—the erstwhile peaceable,

happy, law-abiding community becomes a besom of destruction; it halts at no injustice, no cruelty, no brutality; it is deaf to the voice of reason, mercy and humanity.

Such is the mob—the mob major—maddened by lust, plunder, passion, hunger, hatred, personal revenge; the mob subjective, whose madness is superinduced by its own real or imaginary wrongs, interests, or gratification.

Noteworthy among the species is the lynching mob.

It might justly be called the objective mob.

Lynching is defined by Rapalje and Lawrence as mob vengeance upon a person suspected of crime. Both Worcester and Webster define it as the infliction of punishment without legal trial by a mob or by unauthorized persons.

These definitions are, in fact, justified by experience. Ordinarily, and indeed almost universally, a crime, shocking the community by its brutality, is the occasion for the formation and operation of a band of lynchers. The usual, ordinary violations of the criminal law, and generally even brutal and shocking crimes, run their regular course in the courts without suggestion of mob violence. But at unexpected intervals some crime, by reason of its innate repulsiveness, its brutality and wantonness disrupts the equilibrium of the community and the mob forms quickly, spontaneously, and in its restless fury, forgetful of all law and restraint, works its primitive punishment; or, when the community's calm has already been disturbed by a series of crimes, or when, for any other reason, the community is already in eruption, crimes that would otherwise and at other times be left to ordinary judicial procedure produce mob action.

Inevitably, not all those lynched are guilty. In the nature of things, there is neither time nor opportunity for real truth-seeking investigation. The very essence of the mob is swift action, without reflection. Its only law—the very law of its

*This is a revision of Mr. Rosser's address to the American Bar Association at Cincinnati, Sept. 2, 1921, a very able discussion of Lynch Law and Mob Violence by one of the greatest criminal lawyers of the South.

existence—is to act and then reflect, to hang first and try afterwards. Its sole purpose is to supersede and render impossible the form and substance of a judicial hearing. The mob feels no need for pleading, evidence or sentence. It has no doubt, no question. The crime has certainly been committed; it has the criminal in its power; wherefore should there be hesitation or delay? That the unfortunate might escape judicial sentence not only does not deter, but is often itself an incentive to mob action. The calm, careful deliberation of the court maddens the mob. Why should one so palpably guilty take the time of the court and, perchance, escape through its meshes?

The only court action that lynchers respect is that variety, alas, too prevalent, which most nearly approaches their own methods. What lawyer of large experience has not seen, in some inflamed, superheated community, the unfortunate prisoner lynched in the courthouse, although allowed all the naked, dry forms of the law?

As the lynchers reach a judgment without aid from the law, they likewise disregard the law in fixing the punishment. Two of the subterfuges used by mobs to excuse their actions are the delay and the clemency of the courts. The mob is society in eruption, and it is too much to hope that it will reach only adequate and merciful judgments. It subconsciously seeks justification for its existence upon the theory that ordinary methods and remedies have failed and the right end can be reached only by adopting radical processes and extreme, severe remedies. Great wrongs demand extreme punishment. Its existence presupposes the wrong, and it is remedied for the most part with death. The fact that the punishment may not fit the crime does not appeal to the mob. There is neither time nor inclination to deal with such a subtle question—only a punishment swift and terrible can come from the mob. It is a monster whose maw is insatiable.

Lynching is no new demonstration of the mob spirit. From Colonel Lynch it may

have, and doubtless did, take its modern appellation, but in such taking there was no infantile christening. Saul was one of the earlier and most dangerous types of lynchers; and a long line of lynchers, lay and evangelical, preceded and succeeded him. Indeed, lynching has a long and distinguished pedigree, sometimes indistinguishably commingled with the general mob family, and sometimes branching off from the genus as a well recognized species with a nomenclature of its own. Of the latter were the Vemic tribunals of Westphalia, which executed thieves and murderers caught in the act, without delay or trial; and the Jedwood justice, "hang in haste and try at leisure." Lydford law is thus aptly defined:

"I oft have heard of Lydford law,
How in the morn they hang and draw,
And sit in judgment after."

But no matter how it may intertwine and commingle with the records of the mob family, and no matter with or without distinct or specific nomenclature, the mob spirit now designated as lynch law is as old as human society. It is more ancient than any form of organized government. In primitive times it was itself the law, and it took ages of development and restraint to outlaw it; and although long outlawed, it has never been destroyed nor wholly banished. Now and then it emerges from its concealment, its outlawry for the time forgotten, and under its sway the people, in fury and frenzy, deal directly with the supposed criminal, scorning all law and all procedure. That such is the truth all good men deplore, but no wise man will forget.

The mob spirit, including lynching, has no geographical limitations. Whole nations may for a long period be free from its debasing influence. England, prior to the world war, was instanced as a conspicuous example. England, with an Anglo-Saxon, homogeneous population, stolid and well-poised, with fixed stations in life, always free, densely populated, so that its citizens were constantly under the eye and

in the very presence of its law officers, for two centuries secure from serious internal dissension, and for a century saved from the corruption of serious foreign wars, has been happily free from the aroused spirit of the mob. 'It is too much to hope that, even in staid England, such dormant spirit may not, as a result of the mighty upheaval of the recent war, have a terrible awakening. Indeed, it is even now awaking from its century sleep. That it has lain dormant so long is not at all conclusive that it has ceased to exist "In that nook-shotten isle of Albion."

The lynching spirit exists in England because men live there, and she will be thrice blessed if it sleeps as quietly in the future as in the past.

On the contrary, America—East, West, North and South—has, in all its history, been the breeding ground for mobs, racial, political, labor, religious—mobs great and small. Abraham Lincoln, in an address at Springfield, January 27, 1837, moved there-to by tragedies in Mississippi and Missouri, said of mobs and their atrocities:

"Accounts of outrages committed by mobs form the everyday news of the times. They have pervaded the country from New England to Louisiana; they are neither peculiar to the eternal snows of the former nor the burning sands of the latter; they are not the creature of climate, neither are they confined to the slave-holding or the non-slave-holding states. Alike they spring up among the pleasure-hunting masters of Southern Slaves, and the order-loving citizens of the land of steady habits. Whatever then their cause may be, it is common to the whole country."

It necessarily takes no great crisis to organize a mob. The sudden, unexpected, impassioned appeal to class, racial or religious prejudice, may at any time furnish the electric spark that will explode the mob magazine.

The American people are an ebullient, volatile people, likely to boil over or blow up. The explanation is plainly apparent. Our population is hopelessly, inextricably heterogeneous. Approximately ten mil-

lions are of African descent, a little over fifty years removed from the ignorance and dependence of slavery, the poise and self-control of many of whom are now near zero, and whose ethnic characteristics, mental and moral traits, exaggerated by a sudden, licentious freedom, marvelously excite to race prejudice, discord and riot.

A large and dangerous percentage of our white citizens have, without social, political or educational preparation, hastily gathered here from the four corners of the earth. They have taken asylum here with no conception or appreciation of our system of government. They had but lately escaped from the tyranny and oppression of laws in whose making they had no part, and it is a tedious process to make them believe that wise and just laws can be made and safely obeyed, and that liberty is self-restraint and not license. They have just fled from class obstructions and restricted fields of labor, with the expectation that they will enjoy, in their new home, social license and unmolested freedom of labor. It has been and will be difficult to convince such new comers that they cannot labor when they will, how they will and for what they will, and that they can justly kill or destroy to keep their places or to keep anyone else out if, for any reason, they discard them.

America, herself, has boasted that she is the asylum for the governmental vagarist and heretic, no matter what their creed or lack of creed. She has been a very Cave of Adullam, to which have gathered "everyone that was in distress, and everyone that was in debt, and everyone that was discontented." To be the world's melting pot may be a nation's glory, but it has its terrible burdens. The social reaction in so great a melting pot will surely manifest itself in social storms and earthquake.

Serious internal dissensions do not make for law and order. The American citizen has been largely denied that poise and self-restraint that have their growth in long eras of profound internal peace. The Revolutionary War was not only a war with Eng-

land, but was also an internecine war between Americans themselves. The slavery storm arose before the charge of Tory ceased to be the acme of shame and hate, culminating in the Civil War. The white citizens of military age spent four years in its death grapple, with all its attendant confusion and demoralization.

The very privileges of the thoughtless Americans have a tendency to beguile him into lynching. He makes the laws, he elects the judges, governors and sheriffs. He, in common with his neighbors, sits upon the jury. He is very sure that the whole machinery of government is his, and he is half suspicious that he is himself the government. What reason, therefore, in the case of well known or clearly proven criminals, is there why he and his neighbors may not dispense with the forms of procedure that they themselves have made, and with the services of judges, governors and sheriffs whom they have elected, and themselves dispense justice speedily and by direct rather than by indirect and circuitous methods? From the beginning the whole subject was in his hands. He could have made the law other than it is and just as he would. Since guilt is clear, why can he not, quoad hoc, dispense with these forms made by himself? Why can he not break down all forms and himself directly apply the law? While such logic is monstrous, the excited mob unconsciously accepts it and acts upon it, forgetting that such logic will destroy all law and lead to anarchy and certain ruin.

Lynching is also encouraged by the prevalent political heresies—let the people have what they want, let the majority rule, “vox populi vox Dei.” With their nauseating nostrums the shyster and demagogue have poisoned an incredible number of the honest but unthinking. The mob readily persuades itself that it is the people and that it is entitled to its way. It is for the time the majority, at least in temporary power and brute force, and it is entitled to rule. It imagines itself to be the voice of the peo-

ple, and hence its voice is the voice of God.

The legal faddist and reformer have done more than their share in keeping alive and strengthening the mob spirit generally, and the lynching spirit especially. The foundations of the temple cannot be undermined and at the same time the temple itself be preserved in its full strength and beauty. No more can constitutions and the eternal, universal foundations of the law be assailed and discounted without marring their beauty and grace, without lessening their grasp upon the will and obedience of the people, and without weakening their loins and shortening their arms.

Just so far as the legal iconoclasts have, by their chatter and scribbling, reached and misled the thoughtless and unwary, just so far have dutiful respect and docile obedience to the law been shattered; just so far has the mob been strengthened and emboldened; just so far has the jurisdiction of Judge Lynch been enlarged.

If the Constitution were built upon an insecure foundation and false legal architectural lines, or if it could not stand the strain or attrition of government in action, why should it further appeal to the imagination or reason of the people? Why should it further withhold their hands or restrain their wills? In statecraft as well as in commerce, sailors will not knowingly continue service in a rotten ship. If the fundamentals were vagaries, founded on injustice and unrighteousness, for the purpose of protecting the strong and oppressing the weak, to secure the continued reign of one class and the service of another, then the whole superstructure, by the combined efforts of both classes, ought to be destroyed, by the one in shame and by the other in hate; and that, too, although in its place, for the time being, the mob may make the law and Judge Lynch execute it.

If the Constitution ought to be suddenly changed whenever and wherever it restrains an impatient, excited and impassioned majority, could such a barrier ever stand between the majority and its purpose?

How could it ever shield the helpless minority? Why should not the majority go straight to its purpose, without any intervening halts or barriers? Why is not every step taken between the birth of its purpose and its realization but so much useless lost motion?

If the judgments of the courts are so devoid of inherent strength and sacredness that they may be rightfully recalled by the will of the majority, then why trouble the courts to give birth to so many sickly, spineless things? If the judgment of the majority is the ultima thule, why the time and trouble expended in formal, useless lawsuits? Why not at once the imperial will of the mob rule? Why any appeal to Pilate? Why not let the cry, "Crucify him! Crucify him!" be the beginning and Mount Calvary the end?

No faddist or reformer wishes the culmination of such a calamity; but they forget, in their wild zeal and frenzy, that when they destroy every beacon and compass of the past, there are left nothing but the storm and the night.

Neither in the past nor now does the jurisdiction of Judge Lynch extend only to rape cases. As might be expected, the Indians were the first victims in America. Prior to the Civil War, summary execution of negroes was quite unusual. Judge Lynch's victims were, for the most part, white men. The negro was scarcely ever lynched except in cases of conspiracy or insurrection. Until 1850 negroes, even when they killed their masters, mistresses or overseers, were turned over to the law.

Hanging by vigilance committees in California and other western states for crimes against life and property and for political corruption was, in early days, too common to excite comment.

It is, therefore, not to be gainsaid that originally rape had little influence in establishing lynch courts and enforcing lynch law. Always, whenever and wherever the public peace and safety were supposed to be threatened by crime, and public opinion

was too impatient or too inflamed to await the orderly procedure of courts, no matter what the crime—Indian depredations, murder, arson, slave conspiracy or insurrection, incitement of slaves, concealing of slaves, slave stealing, cattle stealing, robbery, gambling—there Judge Lynch's court was organized and his procedure enforced.

But be it said in fairness to all, that previous to the evil influences just before and after the Civil War, rape was rarely committed and practically never by the negroes upon the whites. Even during that war, when those influences were accentuated by arms, rape practically disappeared in the South.

Criminal repetition or criminal brutality are the sine qua non of even public approval of lynch law. In the absence of these, lynch law cannot survive even in communities where the public conscience is at the lowest level. Prior to the Reconstruction era most negro crimes were petty; the crime of rape was infrequent and was unaccompanied by racial hate and revenge. Public passion had not then become so inflamed that it overlooked, if it did not approve, mob law as a necessary remedy.

Reconstruction, with its carpetbaggers, its scalawags, and its horde of pious, misguided troublemakers, wrought, at least in the South, a swift and disastrous change. They at once, as a means to their various ends, destroyed the negro's confidence in and reliance on his old master. They influenced the ignorant negro with dreams of social equality and intermarriage with the whites; they impregnated his very soul with the doctrine that he was the equal of any white man, socially, mentally and morally, and that he had but to assert himself to become his superior and his master. They robbed him of his every stay, his every comfort and hope; and they gave him instead an imagination diseased and distorted, and developed in him a malignant hatred for the only friend he had ever had, and, if experience is of any value, the only real, genuine friend he is, in the near fu-

ture, likely to have. They found him simple, trusting, polite, goodnatured and hopeful; they bereft him, so far as they were able, of all these simple, lovable qualities and, in their stead, gave him unrest, suspicion, hate, a diseased and inflamed ego, an ill-balanced ambition to strut and bluster in place and station for which he had no aptitude by mental or moral equipment or by tradition or training. They found him journeying through life in calm and in happiness and content; they destroyed his chart and compass and committed him to darkness and storm.

The inevitable happened. Millions of lately freed negroes broke loose from all their old moorings. Labor was a synonym for slavery, and they loafed. Freedom involved full liberty of speech, and they preached. They had accumulated for him what the white man had, and from him they took freely when and where they could. He was the equal of any white woman, and if she would not willingly join with him in wedlock, why should he not gratify his lust, even if it did require mutilation and murder? To him liberty meant license, and there swept over the South a wave of chaos and crime that is still today a nightmare to those who lived through it and beyond the comprehension of those who did not.

There seems to have been no effort to keep a complete record prior to 1885, but from sources obtainable, from 1850 to 1860 in the whole country, for rape on white women, three negroes were legally executed and four were burned at the stake; during 1866, 1867 and 1868, three negroes were lynched for rape and four legally executed; while in 1873, 1874, and 1875, twenty-six negroes were lynched for rape and four for attempted rape, and six were legally executed. Taking the period from 1885 to the present time, it is admitted by the negroes themselves that about one-fourth of the lynchings of negroes were for rape on white women, and this is taken as proof positive that it is the raping of white women by negroes that keeps alive the lynch-

ing spirit in the South. That it is not the sole cause is readily admitted, and that even rape does not justify it is not open to dispute; but it cannot be fairly disputed that the frequent fiendish raping of white women by negroes does, as nothing else does or can, nourish and foster lynching and gives it whatever apparent approbation it enjoys. The admission that one-fourth of all the lynchings is for rape is fatal to the contention that it is inherent viciousness of the mob, and not the raping of white women, that explains the Southern mob.

No man with blood in his veins can, in the quiet of an unprotected rural community, stand in the presence of the ravished, mutilated and murdered body of an innocent, simple child of the people, see the pitiful evidence of her struggle for self-defense, and hear the wild wail of shame and grief from her kindred and friends, and at the same time, holding his primitive impulses in leash, preach of "righteousness, temperance, and the judgment to come." Under such surroundings the great Apostle to the Gentiles, after his conversion, might have done so, but there are few Americans of 1921 who have the self-control or the Divine grace to quiet the call of the wild and, in the interest of social peace and quiet calmly uphold the majesty of the law. The ordinary American, no matter where his abode, would most likely forget God and curse the law.

Without a final settlement of the dispute as to whether rape initiated and sustains the present deplorable lynching situation, one thing is sure—it has not in the past, nor will it be in the future, restricted to rape. Every lynching, no matter what the cause, loosens public restraint and leaves the public conscience seared. Law violation does not stop with the infraction of one law, no matter how unpopular or unwise the broken law. When Judge Lynch's court is once called into existence, there is no hope that his jurisdiction will or can be restricted. It will execute today for rape or murder; tomorrow for theft or burglary.

Today the lynchers, no matter how unwisely, may have in mind the good order, peace and safety of society; tomorrow, infected by evil example, they may be the ignorant, the irresponsible and the evil-disposed, with no thought of punishing crime and assuring the public safety and order, but bent solely upon promoting their own evil designs or gratifying personal revenge. Just as the waters of a great reservoir will, when loosened, engulf and destroy the whole valley below, so will the pent-up mob spirit of the multitude, when unloosened and unrestrained, engulf and destroy the whole social fabric. The mob spirit is the very antithesis of order, peace and safety.

Lynching has endured, but it has never met the approbation of the intelligent, thinking people of the South. But the horror of the negro rapist, the dread and danger of him, which for a generation have alarmed and disquieted every unprotected rural district in the South, has stunned them into inaction or appalled them into action, against their own hearts and consciences. Let this one dark terror end; free the women of the South from this ever-dreaded monster, then lynchings for all other crimes will shrink from view like some evil spirit of the night. The public opinion that is at least supine, if not indulgent, will rise in its might and purge the South of its evil lynching report.

It is useless to suggest that there inheres in the law some potent charm that can move the negro rapist or frighten him into obedience. In a vague way he knows that the law stands between him and his passion, but it is too calm in its procedure. It will punish him for his crime, but the judgment of the law does not equal that of Judge Lynch in striking terror to his soul.

To the complaint of the negro against lynching the white man has, often in effect, and at times in words, said: "Stop raping our women and we will stop lynching your rapists." To the lay, undisciplined mind this is a fair proposition, and when not accepted by the negro, the white man is prone

to construe its non-acceptance as a declaration by the negro that he will not stop raping, but that the white man must stop lynching. Of course, if feasible, this would be a rough and ready solution of the problem, and it not at all follows that because the negro will not voluntarily stop raping, the white man is justified in the continuation of lynching. Wrong ought to cease and that, too, without consideration. The crime of rape ought to stop, and the lynching nightmare must, in the interest of both races, stop.

Not a few modern criminal reformers would readjust our criminal procedure to meet the mob's impatient thirst for revenge. They would take from the prisoner every safeguard now vouchsafed to him by the wise and persistent struggles of a hundred years. They would speed up the courts so that they might run a more even race with the mob. If such reformers had their way, a court, in the time of excitement and passion, presided over by a weak and pliant judge, and guided by a prosecuting officer ambitious for advancement and greedy for public favor, could be distinguished from Judge Lynch's court only by a competent expert.

Our judicial system is not perfect, but lynchings cannot be attributed to that fact. Whatever the faults of our legal system, it is not responsible for lynch law. The mob lynches not by reason of any defect or delay in the law, but because the aroused passions of the mob want no law and will wait for no law, no matter how certain, no matter how swift. Lynching is not a protest against law, but is the outburst of primeval passion that ignores all law, waits on no court, and is satisfied with no punishment which it does not select and which it does not inflict. No legal sentence is severe enough, no legal execution brutal enough. The mob wants to rend and tear, mutilate and burn. It will not tolerate the sheriff as executioner. "Vengeance is mine," saith the mob, "and I will wreak it now in a whirlwind of passion and blood."

The law is the child of civilization—the mob is the spirit of the jungle, and it will no more wait upon the law than would the jungle on civilization.

The demagogue who excuses lynching or condones it under the pretense of defects in our legal system or the misuse of the pardoning power is a traitor to the state. And he is the arch-traitor of them all who, as the purchase price of its votes, corruptly deifies the mob as the savior of the state from courts which he claims are inefficient and from governors he charges are faithless.

The mob spirit manifested in lynching is subversive of all law, of all peace and safety, but not more so than is the mob spirit wherever and whenever and however manifested. It has become the fad to arraign lynching as the anathema maranatha of mob violence. Such an arraignment is as far from the truth as most fads.

Few agencies can be more destructive of social order and good government than the labor mob. It does not pretend to punish for violation of the criminal law, but destroys all property that obstructs its selfish ends. It mutilates, maims and kills not only those who do not humbly bow to its bidding, but as well the innocent who happens to be within the radius of the conflict it has provoked. It bullies sheriffs, defies judges, ignores legislatures and congresses, and threatens governors and presidents. And all this not because of any crime committed or any public wrong done, but solely because others decline to contract with it on its own terms and because others wish to work when it will not.

The physical havoc wrought by the labor mob is appalling. In the last decade millions of dollars in property have been destroyed by it needlessly, ruthlessly. Its victims, if accurately known, would far outnumber the unhappy victims of Judge Lynch. In a small area of one of the States not much larger than an ordinary county, the victims of the labor mob outnumber all of Judge Lynch's victims for a year past.

The grand total of all the victims of all such mobs for any one year of the last dozen would surprise and alarm those who have not kept in touch with the labor troubles of the past decade.

The lynching mob is ephemeral; it survives but a day. It is born in a whirlwind of passion, it wreaks its vengeance and is immediately dissolved and absorbed into the community from which it came. It does not live long enough to vote, to adopt constitutions, to pass by-laws, to develop a policy or formulate a creed. Each mob is independent and isolated; it does not harken back to past mobs or reach out in assistance to future mobs. It encourages other mobs only by its temporary but pernicious example. It is few in numbers; its area of operations small; its purposes fixed and limited. In the presence of armed forces, regular or militia, or a well-trained, determined constabulary, it slinks away in the darkness and dissolves in terror.

Too often, the labor mob is born not as the result of a sudden gust of ungovernable passion, but of deliberation and preparation. Each mob is not an isolation, but a part of a fixed system, from which is drawn experience, courage and hope. It may, and often does, live long enough to vote and to exert its corrupting influence upon legislation and administration, to sanction the conduct and reaffirm the creeds of other such mobs, past and present, and by new schemes and devices to strengthen and secure the universal object of all such mobs. The members are too often not few, but include thousands; its area of operations not restricted, but too often includes a province. It is not always dissolved by the active presence of arms or constables, but, in defiance of both, continues, its work of destruction and murder. And when it does dissolve, it does not slink away in darkness or fear, but boldly, defiantly, boasting of its deeds, and with the promise of re-assemblage on its lips.

No matter what may be said in explanation, nothing can be said in extenuation of

lynching. It is an inexcusable and pernicious part of the mob spirit that is constantly and industriously laying the axe at the root of this government. All parties ought to seek its destruction by persuasion, by teaching; and, not least by the terrors of the law.

LUTHER Z. ROSSER.

Atlanta, Ga.

PUBLIC UTILITY CONTRACTS.

HARRISON ELECTRIC CO. v. CITIZENS' ICE & STORAGE CO.

232 S. W. 932

Supreme Court of Arkansas. July 11, 1921.

The obligation of a contract between an electric light company and a consumer, fixing maximum rates, was not impaired by the putting into effect of new rates under Crawford & Moses' Dig. § 1612 (Acts 1919, p. 417, § 7), subject to the control of the corporation commission, as there could be no valid contract as against the power of public control by the commission.

MCCULLOCH, C. J. Appellant is a domestic corporation owning and operating the electric light plant at Harrison, Ark., and appellee. Citizens' Ice & Storage Company, is an industrial consumer of electric current, and a patron of appellant. Appellee claims the right under a contract with appellant's predecessor to obtain electric current for its manufacturing plant at the maximum rate of \$400 per month. Appellant changed the rate on April 1, 1920, after having filed the same with the corporation commission, but appellee refused to pay the increased rate. Appellant then cut off the supply of electric current, and appellee instituted this action in the chancery court of Boone county to enjoin appellant from cutting off the current, and to recover damages in the sum of \$2,000 for the interference with its business in cutting off the current. Appellant answered, setting up its change of rates pursuant to the statutes and under authority from the corporation commission. On the final hearing of the cause the chancery court decided that the change of rates was void, for the reason that proper notice had not been given by appellant in accordance with the statute, and rendered a decree in favor of appellee, enjoining appellant from maintaining the increased rates, and for the recovery of damages in the sum of \$100.

The contention of appellee in support of the court's decree is that the statute creating the corporation commission and conferring jurisdiction over public utilities requires that before a rate can be changed there must be an affirmative order by the commission authorizing it, and that there must be a notice published weekly for 30 days, and that the statute was not complied with in either of these respects. We think that this is not the proper construction of the statute. Crawford & Moses Digest 37; Acts 1919, p. 411. The statute confers jurisdiction on the commission over all public utilities in the state, with power to control and regulate rates of charges and other matters in connection with service to the public. Section 7 of the act of 1919, which is section 1612 of Crawford & Moses' Digest, reads as follows:

"No person, firm or corporation subject to the provisions of this act, shall modify, change, cancel or annul any rate, joint rates, fares, classifications, charge or rental, except after thirty days' notice to the commission and the public, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges shall go into effect, provided, the commission may enter an order prohibiting such person, firm or corporation from putting such proposed new rates into effect pending hearing and final decision of the matter by the commission, and, whenever there shall be filed with the commission any schedule proposing a change in any rates, charges or regulations, the commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative, upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge or regulation; and pending such hearing, and the decision thereon, the commission upon filing with such schedule and delivering to the carrier or carriers or public service corporation affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate or charge, but not for a longer period than six months beyond the time when such rate, fare or charge, or regulation would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge or regulation goes into effect, the commission may make such order in reference to such rate, fare, charge, or regulation as shall be deemed proper and just. Provided, that if said commission shall suspend the operation of any such schedule, and defer the use of such new rate or charge, as herein described, then the person, firm or corporation making such new rate may file with the commission its bond, to be approved by the commission, conditioned that it will pay over in money to the commission for the use and benefit of the persons or patrons entitled thereto, the difference between the sums it shall collect under such new rate and the sums which would have been collected under the rate finally adjudged reasonable and just, with interest

upon such difference at the rate of eight per centum per annum. Upon the filing of said bond, the order of the commission suspending such new schedule or charge shall become inoperative until final adjudication of the matter."

It will be observed that, while the statute provides that no change in the rates shall be made "except after 30 days' notice to the commission and the public," there is no specification as to the method in which the notice is to be given. The contention of counsel for appellee is that the provision for notice in this statute is controlled by the provision of the statute with reference to the length of time for publishing legal notices (*Crawford & Moses' Digest*, § 6809); but this contention is obviously unsound, for the reason that the section just cited only fixes the number of publications, and does not supply any other defects in an imperfect provision for notice. The section we are now dealing with does not specify either the method or place of the publication. The only reasonable interpretation of the statute is that the framers meant that the filing of the schedule in the prescribed form with the commission was sufficient notice to the commission and to the public. This is in accord with our decisions to the effect that notice must be taken of all proceedings and regulations promulgated by public boards. *Kansas City Southern Ry. Co. v. State*, 90 Ark. 343, 119 S. W. 288; *Cazort v. State*, 130 Ark. 453, 198 S. W. 103. The statute is patterned, to a considerable extent, after the federal statute creating the Interstate Commerce Commission, and regulating its proceedings, and it has been decided not only by the Interstate Commerce Commission, but also by the Supreme Court of the United States, that the filing of a schedule of rates by a common carrier with the Commission constitutes notice to the public and puts the new rates into operation. *Texas Railway Co. v. Cisco Oil Mill*, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562; *Kansas City Sou. Ry. Co. v. Albers Comm. Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. Ed. 556; *U. S. v. Miller*, 223 U. S. 599, 32 Sup. Ct. 323, 56 L. Ed. 568; *Berwind-White Coal Mining Co. v. Chicago & Erie R. Co.*, 235 U. S. 371, 35 Sup. Ct. 131, 59 L. Ed. 275.

Nor does the statute require an affirmative order of the commission authorizing that the new rates be put into effect. The rates become effective upon the maturity of the period of 30 days specified in the schedule, unless there is an order of the commission suspending the rates pending a hearing. *Suburban Water Co. v. Borough of Oakmont*, 268 Pa. 243, 110 Atl. 778.

Jurisdiction is conferred on the commission to institute an investigation on its own initiative or to grant a hearing on the protest of a patron. The fact that the changed schedule becomes effective does not deprive the patrons, however, of an opportunity to appear at any time to contest the rates fixed in the new schedule. The rates thus established are not final, and it is the privilege of any patron, or of the commission itself on its own initiative to contest the correctness of the rate. Considering the statute in this light it is clear that the framers of the act did not intend to require the publication of a formal notice, nor that the commission should make an order before the rates became effective. It appears from the record in the present case that the commission made a ruling requiring that in cases of local public utilities there must be publication for two insertions in a weekly newspaper, and the proof shows that this rule of the commission was complied with.

We are of the opinion, therefore, that the schedule of increased rates promulgated by appellant was valid, and, the statute having been complied with, the new rates superseded any contractual rates theretofore established between the parties. There could be no valid contract as against the power of public control by the commission. It would not constitute an impairment of the obligation of the contract for the new rates to be put into effect under the commissioner's control. *City of Camden v. Arkansas Light & Power Co.*, 145 Ark. 205, 224 S. W. 444; *Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co.*, 230 S. W. 897.

It follows that the decree of the chancery court is erroneous, and the same is reversed, and the cause remanded, with directions to enter a decree dismissing the complaint of appellee for want of equity, and for further proceedings not inconsistent with this opinion.

NOTE—Power of State to Change Public Utility Rates Fixed by Contract With Consumers.—Private contract rights must yield to the public welfare where the latter is appropriately declared and defined and the two conflict. Hence, reasonable rates for public service such as electric light and power, telephone, etc., prescribed by a State in the exercise of its police power, are not repugnant to the contract or due process of law clauses of the Federal Constitution merely because, if given effect, they will supersede the rates designated in a private contract between the utility company and a customer entered into prior to the making of the order by the commission vested by the State with jurisdiction over such matters. *Union Dry Goods Company v. Georgia Public Service Corp.*, 248 U. S. 372, 63 L. ed. 309, 39 Sup. Ct. 117, 9 A. L. R. 1420.

This question seems to be very well settled and a large number of cases are cited and quoted from in quite an exhaustive note in 9 A. L. R. 1423.

In *Kansas City Bolt & Nut Company v. Kansas City L. & P. Company*, 275 Mo. 529, 204 S. W. 1074, the Court held that a contract entered into between an electric utility and a private corporation, for the furnishing of electricity at specified rates, was superseded by a higher rate schedule fixed by the Public Service Commission, and said that "no valid reason can be stated why a rate contract entered into between a private manufacturing corporation and a public service corporation would not be just as much an abridgment of the rate-making power of the state, if permitted to stand, as would a rate contract between a municipality and such public service corporation."

Followed by the citation of a large number of cases from various jurisdictions, it is said in 9 A. L. R. 1424: "It is quite generally held that rate regulations do not unconstitutionally impair existing contracts between public service corporations and consumers. This does not mean, necessarily, that the state may not authorize the making of a contract with a public utility for a limited period, with which it could not interfere without unconstitutional impairment of contracts, but it does mean that such authorization has not been generally given, and that private contracts with such utilities are regarded as entered into subject to reserved authority in the state, under the police power or express statute or constitutional provision, to modify the contract rate in the interest of the public welfare. Modification of the rates is, of course, generally made through the delegation of power to the various state public service commissions. The following cases support the doctrine, above indicated, that the state may change private contract rates with public utilities, without unconstitutional impairment of contracts."

The police power, is generally regarded as the basis of the decisions holding that the state may modify private rate contracts with public utilities. And the clause in the Federal Constitution, forbidding the passage of laws impairing the obligation of contracts, it has been said, is not applicable to legislation within the scope of the police power. *Raymond Lumber Company v. Raymond Light & Water Company*, 92 Wash. 330 L. R. A. 1917C, 546, P. U. R. 1916F, 437, 159 Pac. 133.

ITEMS OF PROFESSIONAL INTEREST.

PSYCHO-ANALYSIS AND IMPROVEMENT OF THE CRIMINAL LAW.

We discussed last week some of the chief results of the vastly important research work undertaken in the case of every accused person by the Psycho-therapeutic Laboratory of the Chicago Municipal Court. An exceedingly interesting article on the subject appears in the

issue for 26th August of our American contemporary, the *Central Law Journal*. To this we would refer those readers who have written asking us for further details. The working of the Psychopathic Clinic attached to the Court, its system of intelligence tests, its elaborate indexing of records, its carefully prepared written reports to the trial judge or magistrate, and the very extraordinary correctness of its prophecy as to the future of various defectives charged with crime; these are all described by Hon. Harry Olson, in the article referred to. But the most useful work of the Laboratory has been its practically conclusive demonstration of the close connection between mental or nervous instability and the commission of anti-social acts. Dr. Hickson, the leading pioneer worker of the Laboratory, must be congratulated on his remarkable penological success.

There will always be crime because there will always be individuals whose inherent powers and reactions are far below the normal of social and legal standards. A raising of these standards automatically increases the number of delinquents. In our intensive civilization many acts are crimes which in a primitive society would be but little out of place and among savages rate as virtues.

But at the present time there is a great deal more crime than is necessary, especially of the more brutal kinds. All over the country we hear of crime waves. Even discounting the excess due to transitory causes following the war, there is left in the United States a great body of preventable crime. Attempts have been made to excuse this on the ground that lawlessness of all kinds is inseparable from political liberty. This reason fails when we compare U. S. conditions and U. S. crime statistics with such democratic countries as Switzerland, Norway and Canada.

The psychopathic laboratory in connection with a criminal court enables us to test practically the operation of penological theories to ascertain how they have actually worked in the cases of specific individuals. This is but carrying the scientific method into a new domain, comparable in principle with experimental tests made in recent years with respect to physiological theories. We have seen, in the latter field, how opinions, hoary with tradition and supported by many illustrious names, have been destroyed by simple practical tests carried out in the unprejudiced spirit of scientific inquiry.

The scientific method has been by no means restricted, in practical investigation, to pure

science. A vast new basis for the materials of industry has been created through analytic and synthetic chemistry—the work of the patient laboratory investigator—incalculably augmenting our wealth, in the past few decades. In such eminently practical, and equally scientific fields as agriculture and animal husbandry a revolution has been worked; many inherited theories have been disproved; others have survived and received scientific explanations, and many new reactions have been observed and given place in a scheme of natural law.

In method and purpose modern psychopathology now takes its place among these great studies for human advancement. Its laboratory is comparable with the laboratory of the physicist, the chemist, the metallurgist, the zoologist, the biologist; in broad terms its methods are identical. The material is intensively studied from every angle and classified in accordance with its nature and reactions. Of course the particular technique of the psychopathic laboratory is peculiar to itself, having but little in common even with such a closely allied field as normal psychology.

Until recently, in our own country, at least, there has been no conveniently accessible body of material available for this study. The criminal court clinic and the segregation of defectives are of recent origin in the United States. The clinics are at present, and probably will for a considerable time, be more varied in material and more fruitful than the institutions for defectives, which are only just coming into being.

The keeping of precise, signed records by the Laboratory not only conserves personal responsibility, but also makes it possible to abstract information on any category, with individual figures and averages. It is possible, as illustrated by the numerous tables accompanying the earlier report, to show the situation with respect to any class of offenses, or any age group, either sex, or any of the various types of defectives. By this means all the information acquired in routine work remains available for comparison and analysis criminology, and to some extent sociology, derives from this body of knowledge proved laws which can be relied upon.—*Solicitors' Journal*, London.

[The interest in the subject of Psycho-Analysis as applied to the administration of criminal law is growing and the *Central Law Journal* is planning to publish further articles on this subject. Judge Olson of the Chicago Municipal Court, has, by summarizing the interesting experiments of the Psychopathic Laboratory of that Court, given the subject a place of great practical importance in the administration of the criminal law.—Editor.]

HUMOR OF THE LAW.

"Go to the aunt, thou sluggard;"

He went—she would give him no more;
So he had to go to his uncle,
Where oft he had been before.

"You must have kept a great many people out of the Penitentiary during your professional career."

"Oh, yes," said the eminent criminal lawyer.

"Did you ever regret defeating the ends of justice?"

"Only once. I got a pickpocket acquitted and discovered later that he was a distant relative of mine."—*Birmingham Age-Herald*.

Among the witnesses called in a trial in a Southern court was an old darky.

"Do you swear that what you tell shall be the truth, the whole truth and nothing but the truth?" intoned the clerk.

"Well, sah," returned the witness, shifting uneasily, "dis lawyer gemmun kin make it a pow'ful lot easier on hisself an' relieve me of a mighty big strain ef he'll leave out anything about gin and chickens. 'Ceptin' fo' dose, Ah guess Ah kin stick to de truth."—*The American Legion Weekly*.

A New York silk merchant went to the bank to get his note renewed.

"I am sorry," said the banker, "but it will be absolutely impossible for me to renew your note."

The silk merchant's face paled. After a moment of thought he looked up at the banker and asked:

"Were you ever in the silk business?"

"Why of course not," answered the banker.

"Well, you're in it now," said the silk merchant as he picked up his hat and went out.—*Cincinnati Enquirer*.

"How do you manage to make both ends meet?" we said to the happy little housekeeper.

"Oh, but I don't make both ends meet," she corrected. "I keep house like the United States, and never make ends meet."

"Like the United States?" we queried, puzzled.

"Yes; I get what I want whether I can afford it or not, and then at the end of the year I give my husband a deficiency bill. You know; just like Congress does every session, to make the public think it has lived within its income." Whereat we were lost in admiration.—*Leslie's*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the
State Courts of Last Resort and of the Federal
Courts.

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may be procured by sending 25 cents to us or to the West
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1. **Adverse Possession**—Government Land.—Although islands in a stream were in possession of plaintiff and her predecessor for over 30 years, no title to them was thereby acquired; they being government land.—*Bode v. Rollwitz*, Mont., 199 Pac. 688.

2. —Use Conferred by Grant.—Where a right to use is conferred by grant, any use reasonably consistent with such grant will be referable to such grant, and will not be deemed adverse.—*Kelley v. Armstrong*, Ohio, 132 N. E. 15.

3. **Assault and Battery**—Intent.—Any laying of hands upon child of tender years by one without authority or control over such child is unlawful, and constitutes an assault.—*State v. Brewer*, Del., 114 Atl. 604.

4. **Bankruptcy**—Civil Contempt.—Bankruptcy Act, § 41b, prescribing procedure for contempts before a referee, does not apply to a proceeding in contempt against a bankrupt for violation of an order of the court, which may be prosecuted in usual form by his trustee.—*Biderman v. Cooper*, U. S. C. C. A., 273 Fed. 683.

5. —Mistake.—The trustee of a deceased bankrupt joined in a conveyance or real estate and received a share of the proceeds, in the mistaken belief, shared by all the parties, that bankrupt before his death was owner of a vested interest in remainder in the property, whereas his interest was contingent and was terminated by his death prior to that of the life tenant. Held that the mistake, under the law of Pennsylvania, was not one of law only, but of law and fact, and the court, under Bankruptcy Act, § 2, subd. 7, had jurisdiction to order the fund paid over to the lawful owners of the property sold.—*In re Russell*, U. S. D. C., 273 Fed. 724.

6. **Banks and Banking**—Dishonor of Draft.—In an action against a trust company on a dishonored draft drawn by it on an Italian banking institution, through the commissioner of banks had taken charge of the property and business of the defendant, plaintiff was entitled to a judgment measuring its damages in strict conformity under Rev. Laws, c. 73, § 9, where the action was at law without the intervention of the commissioner of banks.—*American Express Co. v. Cosmopolitan Trust Co.*, Mass., 132 N. E. 26.

7. —Forgery.—The opportunity to proceed at once against the forger of a check is a valuable one, deprivation of which by failure of the bank on which the check is drawn to give notice promptly to the bank which cashed or collected the check conclusively determines that the loss has resulted, unless it is shown there is on hand a fund belonging to the forger out of which defendant collecting bank can reimburse itself in whole or in part.—*Union Nat. Bank v. Farmers' & Mechanics' Nat. Bank*, Pa., 114 Atl. 506.

8. **Bills and Notes**—Duress.—The rule that notes given to prevent threatened prosecution of a relative for criminal misappropriation of funds are void for duress or compounding a felony, and that, both parties being wrongdoers in stifling a charge of crime, payments made on such notes cannot be recovered, is not affected by the possible innocence of accused, at least where the charge of crime is not made in bad faith, nor by the fact that the prosecution had not been actually initiated but merely threatened.—*Union Exch. Nat. Bank v. Joseph N. Y.*, 131 N. E. 905.

9. —Holder in Due Course.—Allegation and inference, unsupported by proof, or facts, are insufficient to overcome positive evidence showing that the plaintiff in a suit upon negotiable promissory notes against the makers acquired such notes "in due course," and hence that his right of recovery could not be affected by any want or failure of consideration as between the makers and the original payee.—*Monticello State Bank v. Martin*, La., 89 So. 210.

10. —Notice of Defect.—Under Negotiable Instruments Law, §§ 94, 95, 98, 115, the transferee of negotiable paper, to have notice of a defect in the title of transferor, must have had actual knowledge of the defect, or of such facts that his action in taking the paper amounts to bad faith.—*Vogel v. Pyne*, N. Y., 189 N. Y. S. 285.

11. —Renewal.—A note given in renewal of a valid note is good in the hands of an assignee of the payee, without proof of his good faith, though when the payee took the renewal he promised the maker that he would place it as collateral to a loan then contemplated and would not otherwise negotiate it, and, failing to procure such loan, negotiated it in violation of his promise.—*Farmers' State Bank of Cologne v. Skellet*, Minn., 183 N. W. 831.

12. **Bridges**—Liability of Municipality.—The county primarily is obligated to construct and repair bridges upon state or county roads and the approaches thereto over streams within the limits of municipalities, but municipalities

are not thereby relieved from their obligation to keep such bridges and the approaches thereto "open, in repair and free from nuisance"; neither are such municipalities relieved from the duty to safeguard travelers upon such structures within the limits of municipalities against dangerous defects amounting to a nuisance.—*City of Youngstown v. Sturgess*, Ohio, 132 N. E. 17.

13. **Brokers—Commissions.**—A broker employed to find a purchaser on or before a specified date was required to find a purchaser able, ready, and willing to buy and to notify the owner that he had found a purchaser and give him an opportunity to carry out the contract, but personal notice was not necessarily required, and, if he procured such a purchaser within the time specified and went in good faith to the owner's residence and could not find him, and on or before the specified date deposited in the post office directed to the owner with postage duly paid a written notice that he had found a purchaser and a written notice from the purchaser that he was ready and willing to buy on the terms given, the broker was entitled to commissions.—*Lingquist v. Siebold*, Mont., 199 Pac. 709.

14. **Carriers of Passengers.**—Liability of Carrier.—A street railway company was not negligent in failing to restrain a crowd waiting for a car, at a stopping place where there was no station or platform, and passengers boarded the car from a public street, and was not liable for injury to a child pushed under the side of car by the crowd, assuming that she was a passenger.—*Savickas v. Boston Elevated Ry. Co.*, Mass., 132 N. E. 29.

15. **Liability of Carrier.**—Where a carrier has permitted third persons to enter on its premises, or cars, and become passengers thereof, the carrier is required to exercise the utmost vigilance to protect the passengers from insult and injury arising from others who occupy similar relations with respect to the party injured, but a different rule prevails with respect to the carrier's liability for injuries to passengers who receive injuries from the acts of persons beyond the control of the carrier, and for which it is in no way responsible, in which case the carrier is only required to exercise ordinary care and vigilance to discover and prevent injury to passengers.—*Williams v. East St. Louis & S. Ry. Co.*, Mo., 232 S. W. 759.

16. **Negligence.**—A petition alleging that deceased was killed by the negligence of defendant's servant in suddenly starting or permitting a freight elevator to start up, while deceased was placing machinery on it, without warning, when the operator knew or by exercising ordinary care could have known deceased was in a dangerous position, charged specific negligence, thus preventing the application of the doctrine of *res ipsa loquitur*.—*Grimm v. Globe Printing Co.*, Mo., 232 S. W. 676.

17. **Commerce—State Laws.**—Laws N. D. 1919, c. 138, providing for the appointment of a state inspector of grades, weights and measures, with power to establish grades for grain, seeds, and other agricultural products, at which the same shall be bought and sold, to issue licenses to persons engaged in buying grain as deputy inspectors, to fix charges for grading, inspecting and weighing grain, and to "establish a reasonable margin to be paid producers of grain by warehousemen, elevators and mills," and requiring all buyers of grain to procure licenses and pay an annual fee of \$10 therefor, and that all grain shall be inspected and graded when offered to them for sale or shipment, held unconstitutional, as imposing a direct burden on interstate commerce. In view of United States Grain Standards Act, which covers the subject of inspecting and grading grain shipped in interstate commerce.—*Farmers' Grain Co. v. Langer*, U. S. C. C. A., 273 Fed. 635.

18. **Constitutional Law.**—Motives of Legislature.—It is not the province of the judiciary to question the motives of the Legislature in creating a position, if it has acted within the limits of its constitutional authority.—*Devoy v. Craig*, N. Y., 131 N. E. 884.

19. **Virgin Islands.**—The Virgin Islands, acquired by treaty, while appurtenant to the United States, are not a part thereof, within

several meanings, such as citizenship, revenue laws, and judicial establishment, and are governed as to judicial proceedings by Organic Act, March 3, 1917, continuing in effect the local laws, "in so far as compatible with the changed sovereignty," to be administered through the local tribunals; but such territory is under the absolute dominion of the United States, and the inhabitants are entitled to the protection of the Fifth and Sixth Amendments and other constitutional guaranties, so that conviction of felony by trial beginning by a police investigation, at which the evidence was reduced to writing and followed by trial by the district court without a jury, in which the written testimony was used, but no witnesses called, though defendants were offered right to do so, was not according to due process of law, and could not be sustained.—*Soto v. United States*, U. S. C. C. A., 273 Fed. 628.

20. **Corporation—Double Agency.**—A double agency by which one was secretary and treasurer of a corporation and also agent of its fiscal agent under a contract to sell its stock was permissible and legal where known to and acquiesced in by both principals.—*Gardner v. Michigan Employers' Casualty Co.*, Mich., 183 N. W. 738.

21. **Issue of Stock.**—Under the Constitution and laws of Delaware it is permissible for a corporation to issue its capital stock in exchange for property less in value than the par of the stock, but an agreement that such stock so issued shall be fully paid and nonassessable is forbidden as against the company or its creditors.—*Peters v. United States Mortgage Co.*, Del., 114 Atl. 598.

22. **Covenants—Restrictions.**—Where the owner of land subdivided it and sold lots subject to restrictions that each should be used for residence purposes only, etc., and thereafter the owner sold her own lot under contract that it should be used for a restaurant or cafe purposes, with music, dancing, and other legal amusements permitted, she cannot thus be permitted to violate the restrictions in her deeds, having accepted their benefits.—*McQuade v. Wilcox*, Mich., 183 N. W. 771.

23. **Divorce—Alimony.**—Under St. 1919, § 2367, providing that when alimony shall be adjudged to the wife the court may provide for payment at such times as shall be deemed expedient, and impose it as a charge upon any specific real estate, the court may impose a charge or lien for past-due alimony on the husband's real estate, whether it be a homestead or not.—*Ashby v. Ashby*, Wis., 183 N. W. 965.

24. **Alimony.**—A wife, who obtained a divorce decree entitling her to a specified amount per month for the maintenance and education of children placed in her custody and for her own support and maintenance, without segregating the amount intended for the maintenance and education of the children, could not recover alimony after either or both of the children had attained their majority, without procuring a modification of the decree by the court in which it was rendered, on proof as to the sum intended for her maintenance and support aside from that of the children.—*Evans v. Evans*, Wash., 199 Pac. 764.

25. **Electricity—Degree of Care.**—Where a declaration in an action for damages for wrongful death of a person against an electric company engaged in the business of supplying electric current for domestic use alleges that the deceased was lawfully upon the premises at the place where he received the electric shock which resulted in his death, the plaintiff cannot recover if the evidence shows that the deceased, a boy of about 14 years of age, was unlawfully at the place where he received such electric shock, and where his presence could not have been anticipated by the exercise on the part of the company's officers of due care, prudence, and foresight.—*Kay West Electric Co. v. Roberts*, Fla., 89 So. 122.

26. **Negligence.**—A bather in the Harlem River, a navigable stream, was in the enjoyment of a public highway and entitled to reasonable protection against destruction by an abutting owner's high-tension electric wires, and did not cease to be a bather entitled to such protection and become a trespasser by going upon a springboard affixed to the abut-

ting property and extending beyond the property line over the public waters, where there was no causal connection between his position on the springboard and his injury from the fall of a cross-arm and the electric wires which it carried.—*Hynes v. New York Cent. R. Co.*, N. Y., 131 N. E. 898.

27. **Eminent Domain—Marker on Highway.**—Erection of a monument or marker made of stone on an international highway, erected by a highway association, containing the letter "L" to inform the traveling public that the road was known as the Lincoln Highway, and also containing a tablet to the effect that the monument was dedicated to a national field secretary of the highway association, held not to constitute the taking of private property for public use without compensation, nor as imposing an additional burden upon the property of the adjoining landowners.—*Sears v. Hopley*, Ohio, 132 N. E. 25.

28. **Explosives—Negligence.**—A packer and distributor of cans containing explosive or other dangerous materials is liable to a purchaser from a retail druggist for injuries from negligence resulting in an explosion on opening a can.—*Hollenbeck v. S. Wander & Sons Chemical Co.*, N. Y., 189 N. Y. S. 334.

29. **Fixtures—Condition Sale.**—Under Personal Property Law, § 62, a seller of property under an unrecorded conditional sale contract will not be permitted to remove the property over the objection of a mortgagee advancing money without notice of the conditional sale contract.—*McCloskey v. Henderson*, N. Y., 131 N. E. 865.

30. **Fraud—Deceit.**—In an action for damages for deceit in the sale of an ice machine, the complaint alleged that the seller represented that the machine, when installed, could and would keep the buyer's ice box at a temperature low enough to prevent meat from spoiling. Such a representation is held to be more than an expression of opinion or a prediction.—*Schmitt v. Ornes Esswein & Co.*, Minn., 183 N. W. 841.

31. **Garnishment—Property of Municipality.**—As the rule that property in the hands of a municipality is not subject to garnishment is one of public policy, it cannot be waived by the failure of the officers of the municipality to object.—*Vaughan v. Condon*, Cal., 199 Pac. 545.

32. **Indemnity—Judgment Against Indemnitor.**—A corporation which, on purchasing a business, agreed to fill the seller's orders and to hold him harmless from liability to his customers, and, on failing to fill such orders, paid to the seller the amount of a judgment recovered by him as indemnity, may call on the seller to appropriate from the amount thereof sufficient money to satisfy a judgment thereafter recovered by a customer against it, and need not wait until it has suffered harm by payment of the debt; the position of the parties being analogous to that of principle and surety.—*Jose v. North & Son v. North*, N. J., 114 Atl. 411.

33. **Insurance—Accidental Poisoning.**—Where the insured received septic poisoning as a result of the use of a hypodermic needle, such poisoning, which resulted in death, must be deemed due to accidental means within an accident policy.—*Townsend v. Commercial Travelers' Mut. Acc. Ass'n of America*, N. Y., 131 N. E. 871.

34. **Hazardous Employment.**—The position of "flagman on a freight train" comes within the meaning of the language, "conductors and other similar railway employees," in the by-laws of a fraternal benefit society, requiring notice of insured's change of occupation to one of such more hazardous employments.—*Sovern Camp*, W. O. W. v. Allen, Ala., 89 So. 59.

35. **Specific Goods.**—The goods specifically named in the coverage clause of such a policy cannot be excluded by some general prior exception therein.—*Olson v. Great Eastern Casualty Co.*, Minn., 183 N. W. 826.

36. **Intoxicating Liquors—Effect of Eighteenth Amendment.**—The Eighteenth Amendment prohibits the production of and the traffic in intoxicating liquors for beverage purposes, but it does not destroy all property rights in such liquors for beverage purposes,

where such liquors were lawfully acquired before the amendment became effective and are only lawfully used.—*Hall v. Moran*, Fla., 89 So. 104.

37. **Effect of Eighteenth Amendment.**—The Eighteenth Amendment to the federal Constitution is an innovation in the dual system of government under the Constitution of the United States. It extends the federal power to intrastate control of intoxicating liquors for beverage purposes, and its prohibitions are in the nature of police regulations.—*Wood v. Whitaker*, Fla., 89 So. 118.

38. **State Laws.**—In so far as state laws are appropriate to enforce the prohibitions contained in the Eighteenth Amendment, they may be valid, though they differ from federal enforcement laws as to procedure or penalties, for in enforcing the organic prohibitions the state and federal powers are concurrent.—*Johnson v. State*, Fla., 89 So. 114.

39. **Landlord and Tenant—Repairs.**—In the absence of contract, a landlord is not bound to make repairs to rented premises.—*Patton v. Eveker*, Mo., 232 S. W. 762.

40. **Repairs.**—Where a porch collapsed under a tenant, the fact that some time previously the landlord had voluntarily increased the height of the porch above the ground, so that the injuries to the tenant were more severe than they otherwise would have been, does not make the landlord liable, where he was not responsible for the cause of the collapse.—*Gehr v. Director General of Railroads*, Pa., 114 Atl. 491.

41. **Licenses—Powers of Municipality.**—A municipality authorized by Burns' Ann. St. 1914, § 8656, subd. 39 to license, etc., taverns, restaurants, etc., or places used or kept for public entertainment, cannot, by declaring in an ordinance that places where soft drinks are dispensed are places of public entertainment, enlarge its powers so as to impose license taxes on soft drink vendors.—*City of Jeffersonville v. Nagle*, Ind., 132 N. E. 4.

42. **Master and Servant—Casual Employee.**—Where through arrangements made between a telephone company and an electric light company a lineman of the telephone company was "loaned" or transferred for special service to the electric light company to assist in resetting a few light poles in order that paving construction would not be delayed, the work being temporary and nothing being said as to the length of employment, the work to be done or wages, the lineman was only a "casual employee" of the electric company within the Workmen's Compensation Act, and having received injuries caused by negligence of the electric light company, he was entitled to sue for damages in the district court.—*Porter v. Mapleton Electric Light Co.*, Iowa, 183 N. W. 803.

43. **Casual Employee.**—The employment of a contractor constructing a corner for a retired farmer, who lived in a nearby town, was of a "casual" nature within the meaning of the Workmen's Compensation Act as it stood in 1916.—*Oliphant v. Hawkinson*, Iowa, 183 N. W. 805.

44. **Death from Disease.**—Compensation is allowable for the death of an injured employee, developing a fatal disease after exposure to the weather, though the injury itself would not have caused death, but it is sufficient if it was the proximate cause.—*Anderson v. Industrial Insurance Commission*, Wash., 199 Pac. 747.

45. **Employee of Interstate Carrier.**—The son was accidentally killed while in the employ of an interstate common carrier by express. Held, that there was liability under the Workmen's Compensation Act, notwithstanding that fact.—*Pushor v. American Ry. Exp. Co.*, Minn., 183 N. W. 839.

46. **Interstate Commerce.**—A railroad section hand returning on a hand car from his work of repairing the track is engaged in interstate commerce so as to render the railroad liable under the federal Employers' Liability Act, for the negligence of his co-employees on another car running over him.—*Wagner v. Chicago & A. R. Co.*, Mo., 232 S. W. 771.

47. **Partial Disability.**—A master cannot escape liability for compensation for permanent

partial disability under the Workmen's Compensation Act because the employee, before expiration of the period covered by payments, returned to work and received the same compensation as before.—*Mercury Aviation Co. v. Industrial Acc. Commission of California, Cal.*, 199 Pac. 508.

48. **Municipal Corporations—Injury to Pedestrian.**—The fact that one owns an interest in a building does not make him liable for injuries received by one falling over a rope across a sidewalk in front of it.—*Westfall v. Leamon, N. Y.*, 189 N. Y. S. 211.

49. **Negligence.**—It is a city's nondelegable duty to have a dangerous excavation in a street, arising from improvements in progress, guarded at night, and this, through the work being done by a contractor, so that, the guarding being intrusted to the contractor, he is in that respect the city's agent, and any negligent omission in that respect is its negligence, though it had no notice.—*City of Indianapolis v. Cox, Ind.*, 132 N. E. 8.

50. **Officer Not "Laborer."**—An officer of a municipal corporation is not to be regarded as a "laborer" within Civ. Code, art. 2143, providing that if, without any serious ground of complaint, a man should send away a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his service arrived.—*State v. Jordan, La.*, 89 So. 15.

51. **Power to Levy Taxes.**—Where a city, recognizing the potency of a proviso in the repealing clause of an act, granting it the same powers exercised by it under an act with reference to the levying of taxes for the maintenance of a bridge approach, that such repeal should not affect any vested right, remedy or property acquired theretofore, repeatedly and uniformly thereafter refrained from assessing property adjacent to such approach for the cost of repairs and improvements thereon, it could not assess the property of an adjacent property owner for the cost of a new sidewalk on the approach; the rule of practical construction applying.—*Carbonetti v. City of Amsterdam, N. Y.*, 189 N. Y. S. 272.

52. **Pledges—Corporate Bonds.**—Contracts between persons interested in speedway enterprise and materialism, whereby corporate bonds were placed as collateral security to a note given the materialmen, held to create the relation of pledgor and pledgee, which was not changed by reason of vesting of the title to the property of the speedway in the trustee in a mortgage on foreclosure of such mortgage.—*Wheeler v. St. Paul Crushed Stone Co., Ind.*, 132 N. E. 1.

53. **Railroads—Defective Car.**—A carrier's liability under the Safety Appliance Act 1903, § 1, to its switchman for injury resulting from a defective handhold, is not affected by the fact that the car so defectively equipped did not belong to the carrier, and was not being used by it for the purpose of transporting a shipment therein, but was picked up by the switching crew and utilized temporarily for the purpose of enabling the crew to reach and remove another car.—*Tyon v. Wabash Ry. Co., Mo.*, 232 S. W. 786.

54. **Sales—Implied Warranty.**—The warranty of the seller of personal property does not, as a rule, impose liability upon him as to third persons who are not parties to the contract, the doctrine of covenants running with the land applying only to real estate, so that the benefit of a warranty does not run with the chattel to the original buyer's customer.—*Birmingham Chero-Cola Bottling Co. v. Clark, Ala.*, 89 So. 64.

55. **Rescission.**—Where the purchasers of a bakery, after delivery of possession, refused to pay, repudiated the contract and abandoned the property, the seller's act in retaking possession of and reselling it did not indicate any acquiescence in such repudiation or any intent to end the sale, so as to constitute a rescission, he not being required to leave the property without protection, though title had passed to the purchasers.—*Phillips v. Stark, Cal.*, 199 Pac. 509.

56. **Rescission.**—When buyer rightfully rejects goods because they do not conform to the contract requirements, he is under no obligation to return them to seller, but may simply refuse to regard them as his.—*Harriman v. Richardson, D. C.*, 273 Fed. 752.

57. **Offer to Purchase.**—Defendant's letter, in response to plaintiff's offer of paper stock at \$31 a ton, in which defendant stated that it would not pay over \$28 a ton, was not an offer to purchase at that price, but merely an invitation to further negotiations and plaintiff's attempted acceptance did not create a contract.—*De Vito v. Boehme & Rauch Co., Mass.*, 132 N. E. 35.

58. **Searches and Seizures—Warrant.**—The police have the power and it is their duty, to search person arrested and the place in which he is arrested, without a warrant for making such search.—*People v. Kalnin, N. Y.*, 189 N. Y. S. 359.

59. **Specific Performance.**—Agreement to Will Property.—Where Owner of property after considerable talk with father of seven year old boy agreed that she should take the boy, raise him as her own boy, board, clothe, and educate him until he was of age, and give him everything she owned when she was through with it, and where the boy consented to the agreement, the boy on owner's death, without willing him her property, could bring action to specifically perform the contract; he being a party thereto.—*Bassett v. American Baptist Publication Soc., Mich.*, 183 N. W. 747.

60. **Sunday—Unenforceable Contract.**—Where the parties had done no more than to agree on the terms of a land contract, unenforceable, under the statute of frauds, until reduced to writing and signed by them, and pursuant to agreement that they should meet at a subsequent date and conclude their bargain they met on Sunday and then concluded the bargain by executing and delivering a written agreement, such contract was unenforceable.—*Janowski v. Przebieglec, N. J.*, 114 Atl. 419.

61. **Taxation—"Doing Business."**—The deposit of money in a savings bank or trust company by a nonresident, and allowances and credit by the depository of interest thereon, does not constitute the depositor one engaged in doing business within the state within Tax Law, § 220, subd. 2.—*In Re Green's Estate, N. Y.*, 131 N. E. 901.

62. **Stock Dividends.**—Under Const. art. 8, § 1, as amended in 1908, providing that the rule of taxation shall be uniform, and that taxes may be imposed on income, Act 1917, declaring that the term "income" shall include dividends derived from stock, the term "dividends" including any distribution, whether in cash or in the stock of a corporation, is valid, and a stock dividend paid to the shareholder by a foreign corporation doing no business in Wisconsin is taxable as income, although not disposed of by the stockholder; for, regardless of what might be the rule between life tenants and remaindermen, the stock dividend was income.—*State v. Nygaard, Wis.*, 183 N. W. 884.

63. **Trade Unions—Resort to Courts.**—A trade union rule; prohibiting resort to the courts in any controversy arising within the organization for which the laws of the union provide a means of settlement, without having previously exhausted all remedies within the brotherhood, does not prohibit a member from seeking to enjoin a strike which he contended was called by the union officials without authority, where the strike was to begin within a few days, and the only redress within the brotherhood was by appeal to the next convention, which would not meet for 14 months.—*Burke v. Monumental Div., No. 52, B. of L. Engineers, U. S. D. C.*, 273 Fed. 707.

64. **Trial—Valid Verdict.**—A verdict reading "We, the jury, find," but signed by only nine of them, was not invalid under Rev. St. 1919, § 6629, in not reading, "We, the undersigned jurors, find;" the words "undersigned jurors" not being required by the statute.—*West v. Kansas City Rys. Co., Mo.*, 232 S. W. 749.

65. **United States—Emergency Fleet Corporation.**—The Emergency Fleet Corporation is not such an agency of the government as to render it immune from suit.—*Elchberg v. United States Shipping Board E. F. Corp., D. C.*, 273 Fed. 886.

Central Law Journal.

St. Louis, Mo., November 4, 1921.

RIGHT OF THE LEGISLATURE TO IMPOSE DIFFERENT EDUCATIONAL QUALIFI- CATIONS FOR DIFFERENT TRADES AND PROFESSIONS.

The much abused Fourteenth Amendment, and especially that clause which relates to the taking of property without due process of law, is often used by state courts (very seldom today by the Supreme Court) as a foundation upon which to set up their own views of public policy in opposition to that declared by the legislature in the exercise of the police power. In doing this the courts are not only ignoring certain well-known rules of constitutional construction, but are feeding the flames of popular discontent with the administration of justice.

Such opinions as the recent opinion of the Illinois Supreme Court of Illinois in the case of *People v. Love*, 131 N. E. 809, is an instance in point. The legislature of Illinois, after an extensive investigation of the facts, declared that the practice of chiropractic as then carried on in the state was dangerous to the public health and safety and, to guard against such dangers, proposed what appeared to them to be some reasonable and necessary regulations. The Supreme Court relied upon evidence in the case to show that the legislature was mistaken in its diagnosis and held the regulations to be unconstitutional, basing its conclusions on the fact that "the evidence before the Court showed that the practice of the science of chiropractic is not deleterious to the public health." What justification can there be for any court to hear evidence on the question of the policy or expediency of a law? Who are to judge of the facts upon which the police power of the state rests? The legislature has hitherto been regarded as the supreme arbiter of the existence of emergencies of this kind. The Courts are required to accept the legislative

finding determining simply whether the regulations proposed as a relief are valid in view of specific Constitutional restrictions.

Our chief objection to the Illinois decision in this case is the clean "bill of health," so to speak, it gives to the practice of chiropractic, against the clear declaration to the contrary of its own legislature. It was unnecessary for the Court to declare that "constantly comes proof before the courts that chiropractic, which apparently is a limited practice of osteopathy, does enable the chiropractor to relieve and cure many of the ailments of human beings and that the practice of this science is in no way deleterious to the human body. That is the proof in this record, and such is the proof that has been made in many other cases that have been reviewed by courts of last resort."

It is for the legislature and not for the courts to say whether a certain practice under certain conditions is deleterious to the public health; it is for the courts to determine whether, taking the legislature's diagnosis as true, the means adopted are within the Constitution. In this case the legislature provided that an applicant for a license to practice chiropractic must be a graduate of a professional school, college or institution teaching the system of treating human ailments for which the applicant desires to be licensed, which requires as a prerequisite to graduation four years' course of instruction, the time elapsing between the beginning of the first year and the ending of the last, or fourth year, to be not less than forty months, and which is deemed to be reputable and in good standing.

The Court objected to this apparently reasonable regulation because it imagined that, because the educational requirements for physicians and surgeons were not in all points exactly similar, the legislature intended in some way unlawfully to discriminate against chiropractors. Why should the Court even seek to compare the educa-

tional requirements in the case of chiropractors with those demanded of physicians any more than with those demanded of lawyers or the licensees of any other profession. The Court impliedly admits that chiropractors do not practice medicine, but belong to a distinct profession, along with osteopaths, physicians and surgeons. If that be true, then it was proper for the legislature to make a distinction in educational qualifications if it saw fit to do so. If chiropractic is distinct from the practice of medicine, then it is clearly for the legislature to say how much preparation and what the character of the preparation shall be before a license shall be granted.

We cannot escape the suspicion that the clear logic of this situation was lost sight of by the Court in the unconscious sympathy for chiropractors aroused in their minds by the thought that the legislature was trying to discriminate against chiropractors and drive them out of the state because the legislature believed that the new system of healing was humbug and quackery. We are led to this belief by the frequency with which the Court expresses its firm belief that chiropractic is not quackery, but a genuine benefit to mankind. In one place the Court showed the strong animus that actuated it when it declared that "we must, therefore, in this consideration, treat chiropractic as a useful and lawful business, science or profession, and not as one dangerous or unlawful in its exercise, and subject to abatement or destruction by unreasonable and arbitrary requirements, but as a profession or business that may be regulated by provisions prescribing reasonable requirements of those who apply to practice that profession, without unlawful or unjust discrimination."

Nothing in the statute justifies the Court in its belief that the legislature regarded the practice of chiropractic as being dangerous in itself; it merely declared the view of the legislature, that by reason of the character of those who practiced chiropractic and their lack of scientific preparation,

society was confronted with a real danger. If such danger existed (and for the purpose of this case the Court is bound to accept the Legislature's finding that it did exist) we see nothing in the character of the educational qualifications demanded by the legislature that shows anything unreasonable or discriminatory. In fact, as a general rule, we believe the educational standards for licenses for the practice of all important professions, which affect the life and property of the people, should be raised as high as possible. At any rate, the people have the right to protect themselves from the dangers that clearly threaten society from incompetent practitioners and we know of no constitutional provisions that stand in the way of such reasonable regulations. Of course, discriminations between persons in the *same* class would be unconstitutional, but it is legal and indeed eminently proper for the legislature to make different regulations for different classes. The mere fact that chiropractic is a healing art does not imply that it belongs to exactly the same class as physicians and surgeons. It would be, therefore, no discrimination for the law to make one rule for physicians, another for osteopaths, and still another for chiropractors.

In conclusion, we repeat that the Illinois Court was not concerned with the question of wisdom or propriety of the proposed legislation. Even if the legislature honestly believed chiropractic to be dangerous to society, the Court would have to bow to its decision. That is what the Ohio Supreme Court did in the recent case of *Pohl v. State of Ohio*, 102 Oh. St. (June 7, 1921), when it upheld a law making it an offense to teach the German language. The defendant was a teacher of the German language and was thus deprived of his living entirely. The Court did not attempt to defend the wisdom of this law, but simply said:

"Courts do not sit to review the wisdom of legislative acts, nor do they possess such power. On the contrary, the policy, the

advisability, and the wisdom of all legislation, subject to the veto of the governor and the referendum of the people, are subjects for legislative determination exclusively. The inexpediency, injustice or impropriety of a legislative act are not grounds upon which the Court may declare the act void. The remedy for such evils must be sought by an appeal to the justice and patriotism of the legislature itself."

The Ohio Supreme Court has stated the general rule of constitutional construction of acts passed by the legislature under the police power in strong and clear language. It should be the duty and the concern of the Courts to follow this rule with scrupulous care. Otherwise there will be stirred up in the popular mind a just resentment against what appears to be, not the enforcement of any specific constitutional restriction, but the imposition of the views of the Court upon the legislature with respect to matters which concern the public health and safety.

NOTES OF IMPORTANT DECISIONS.

WHEN PROPERTY IS STOLEN, IS IT ALSO DESTROYED, UNDER STATUTES MAKING MUNICIPALITIES LIABLE FOR DESTRUCTION OF PROPERTY BY RIOTERS?—To steal a thing is not to destroy it, declares the Massachusetts Supreme Court, in *Yalenezian v. City of Boston*, 131 N. E. 220.

This case was one of several actions of tort brought to recover three-fourths of the value of property lost by tradesmen in the recent policemen's strike in Boston. The statute under which the action was brought provided as follows:

"If property of the value of fifty dollars or more is destroyed, or if property is injured to that amount by twelve or more persons who are riotously or tumultuously assembled, the city or town within which the property was situated shall, if the owner of such property uses all reasonable diligence to prevent its destruction or injury, and to procure the conviction of the offenders, be liable to indemnify the owner thereof in an action of tort to the amount of three-fourths of the value of the property destroyed or of the amount of such injury thereto, and may recover the same against any or all of the persons who destroyed or injured such property."

The lower court decided in favor of the plaintiff, but the Supreme Court reversed the judgment on the ground that it was not proven that

the property lost was destroyed or injured, but that on the contrary the evidence seemed to show that the property had been stolen. On this point, the Court said:

"A theft of property does not signify that the thing stolen has been destroyed or injured; it imparts only an injury to the possessory right of the general or special owner to use and enjoy the thing which is capable of being stolen, by taking and carrying it away. By theft the owner does not lose the title or right to possession of the stolen property. He may retake it whenever and wherever he can find it; and he can have for his assistance any force of the criminal and civil law. The statute awards compensation within its terms, to owners of property destroyed or injured as a matter of favor, of public policy and not of right. It follows that there can be no incongruity in denying compensation for injury to property and property rights which are without the purview of the statute."

It seems to us that the Massachusetts Court was too meticulous in the construction of the words "injured" and "destroyed." To steal a thing is to destroy one's property right in it. So far as the owner is concerned, it is immaterial to him whether the physical object is destroyed or not; his property in it is destroyed when his rights of user are taken away. Property in a thing consists of the bundle of rights in such things which the law permits the owner thereof to enjoy. Therefore, "property" in a thing is destroyed even when the thing itself remains unaffected. This argument is no more refined than that which the Court uses to save the City of Boston from a just liability under the statute quoted.

The construction we put on these words is supported by the decisions of other Courts construing similar statutes. *Baltimore v. Poultney & Trimble*, 25 Md. 107; *Sarles v. New York*, 47 Barb. (N. Y.) 447; *Spring Valley Coal Co. v. Spring Valley*, 65 Ill. App. 571; *Solomon v. Kingston*, 24 Hun. (N. Y.) 562. In the last case, Learned, P. J., said:

"The evident meaning of the act * * * is to compensate persons who suffer in their property by reason of mobs and riots. It could make no difference whether the rioters actually destroyed the personal property on the premises of Solomon, or whether they took it out of his premises and then actually destroyed it, and whether they destroyed the boots and shoes by cutting them to pieces or by wearing them out would matter very little to the plaintiff. We think that the fair meaning of the act is that given in *Sarles v. New York* (47 Barb. 447); that the property was destroyed as to the plaintiff when the rioters carried it off. Plunder, as well as wanton injury, is usually the work of such rioters; and the result to the injured person is the same from either wrongdoing."

It seems to us that the small crumb of comfort thrown out to the plaintiff in the opinion of the Massachusetts Court that the plaintiff can "retake" the property and "have for his assistance any force of the criminal and civil law" is not only illogical, but adds insult to his injury. If he had had the proper assistance of the law in the form of police protection against the rioters he would not have suffered his loss. It is small comfort to tell him to go out and find his property and that the law will be more efficient in securing its return than it was in preventing its taking. Why should not the city pay the loss under the statute and then by subrogation assume the right of the owner to find and apprehend the thief and recover the property?

HOW THE CHICAGO BAR ASSOCIATION WALLOPED THE SPOILSMEN—IS THIS ENOUGH?

Chicago has recently passed through a judicial election which has no parallel in the history of that city. Its results were a great surprise to the politically wise. In fact, the circumstances were so unusual and the results so unlooked for by the average observer that the election not only attracted nation-wide attention but was observed with interest and widely commented upon in the press of foreign countries.

In its activity in this campaign the Chicago Bar Association broke all its precedents. For many years past its practice had been before each judicial election to appoint a special committee on candidates to investigate and report to the members upon the fitness of the various candidates nominated by the political parties; the purpose being to enable the members of the Association to vote intelligently at a Bar primary. But experience had shown that if the Bar Association waited until after the party nominations had been made before undertaking to exercise its influence, it was often too late to accomplish any great good because the nominations on both tickets were unsatisfactory. For obvious reasons

that plan would have been unavailing in this election.

Twenty judges of the Circuit Court (the whole Bench) were to be elected. The Bench as a whole (with a few exceptions) was satisfactory. Five of the twenty incumbents were Democrats and the other fifteen Republicans. The Democratic organization was disorganized and discouraged. The dominant Republican organization, known as the city hall faction, was well organized, full of recent victories, confident and aggressive, and plentifully supplied with the means of warfare. All available information led to the belief that the purpose of this city hall faction was to give no consideration whatsoever to long and satisfactory service on the bench, but to oust all of the twenty judges except two who already acknowledged the suzerainty of the city hall, and to fill their places with eighteen others who would owe their seats solely to that organization, and who were either of unknown fitness or of known unfitness for the bench. This enterprise was, of course, a direct assault upon the cardinal principles of the Bar Association, namely, the preservation of the independence and integrity of the bench, and the proper administration of justice. It would have been startling enough under any circumstances but was doubly so now, and for these reasons: this dominant or city hall faction of the Republican party had twice elected its mayor, and through a bi-partisan system of patronage controlled a Democratic city council. It had elected a governor whom many citizens feared. It had secured control of the Chicago Sanitary District, with its vast bonding power, unlimited by the referendum which limits practically every other debt-creating municipality of the State. It would, by electing its ticket for the Circuit Bench, control the appointment of the South Park Commissioners and the expenditure of \$20,000,000 already voted for the construction of a park by filling in Lake Michigan south of Grant Park, and

also of a further sum of perhaps \$50,000,000 which the Commissioners would ultimately spend in completing that great work. It had secured the election of one of its chief members as state's attorney of Cook County, in whose hands was vested the practical control of the enforcement of criminal law. It would, by electing its ticket for the Circuit Court, control the appointment of the jury commissioners; and such control would complete its domination of the machinery for the enforcement of the criminal law. To a suspicious minded or fearsome citizen, these last facts were given a sinister aspect by the contract made by the city administration (in the teeth of a contrary order by the city council) with five so-called real estate experts—the most of whom were not expert—to pay these men nearly \$5,000,000 out of a total bond issue of \$26,000,000, for valuing the damages to private property by the construction of certain public improvements—between two and three million dollars of which vast sum has already been paid.

To block the triumphant march of this confident host did seem a hopeless enterprise, and every one whose political judgment was worth anything said that it was. Most certainly the undertaking was not alluring to lawyers whose clients' interests were largely dependent upon their own good standing at court and in the city hall. But some one had to take the lead and step into the open.

It happened that about a year ago the committee on candidates above referred to of the Chicago Bar Association was made a permanent committee, in the hope that it might thereby wield more influence; and with the hope of further enhancing the influence of the committee, it was composed of nine ex-presidents of the Association, the president also being a member *ex officio*. Mr. John R. Montgomery, the president of the Association, assumed a very active part in the work of the committee. This committee began work last fall and spent

several rather diligent months endeavoring to influence the party managers on both sides to make up acceptable tickets. And while still engaged in this activity it suddenly woke up to the situation herein-above depicted.

The committee promptly called a meeting of the Democratic organization and the various factions of the Republican party, with a view of seeing if some agreement could not be reached which would result in saving the best part of the existing bench, and save the bench as a whole from being degraded to the position of a useful adjunct of a political combination. Everybody responded except the city hall; that fact confirmed in our minds the rumor that the city hall faction proposed to take possession of the entire bench for its own purposes. The committee then strongly urged this plan: that a full ticket be selected at a primary to be conducted by the Chicago Bar Association, at which all lawyers of Cook county should have a vote, and that the ticket so chosen should be supported and nominated by the Republican factions other than the city hall and by the Democratic convention. It was believed that such a primary would result in re-naming all but a very few of the sitting judges, and would produce the strongest possible ticket. The plan met with the hearty approval of nearly all of the political leaders who participated in the conferences, but they were not unanimous and it was therefore discarded as not feasible.

The committee then urged the Democratic managers to place on the ballot under the Democratic column all of the sitting judges, whether Republicans or Democrats, who were willing to run on that ticket. We knew that the two members of the Bench who owed allegiance to the city hall would not accept such a nomination; we believed that all the others would be satisfactory to the great majority of the bar. To this plan the Democratic managers assented, and the factions of the Republican party other than the city hall faction agreed

to give such a ticket their whole support. One of the Republican sitting judges declined to run on that ticket. And the city hall faction, foreseeing some slight danger in a coalition ticket, induced three satisfactory members of the Bench to accept nominations upon its ticket. This placed upon the city hall ticket five sitting judges and fifteen new men—ample for their purposes. The Democratic managers placed upon their ticket the five sitting Democratic judges, the nine remaining Republican judges, a Republican judge of the Municipal Court, and five new Democratic nominees, one of whom was a sitting judge of the Municipal Court. The ticket thus named was fairly satisfactory to the Bar Association committee, who believed that the ticket as a whole merited the support of the bar, and that those men if elected would not submit either in making appointments or in the discharge of their judicial duties to the dictates of any ring or of any official power; and that those considerations were more weighty at that moment than the retention in office of two or three satisfactory judges who chose to cast their lot with the raiders, but who could in no way thwart their plans, whatever they might be. The committee believed to a man that there was only one possible chance of heading off this contemplated raid upon the Bench, and that was by uniting all those opposed to such an enterprise in support of one ticket as a whole. But neither the committee nor the board of managers of the Association felt that the Association should or could be committed to one ticket as a whole without a referendum vote. The committee therefore recommended and the board of managers promptly decided, that the question be submitted to the membership, whether the Association should support one ticket as a whole, and, if so, which ticket; or whether on the other hand it should pursue the long standing custom of holding a bar primary upon both tickets. The membership overwhelmingly supported the board of managers and the committee,

and voted nine to one in favor of the coalition ticket as against the city hall ticket. This decisive vote was confirmed by a vote of the Chicago lawyers at large at a primary conducted by the Lawyers' Association. The cause was taken up by the two strongest newspapers. It was most powerfully supported by the Chicago Woman's Club, the Woman's City Club, and various other organizations, both of the men and of the women voters. The Chicago Bar Association alone raised about \$65,000 for propaganda purposes. The funds at the disposal of the various organizations supporting the coalition ticket were insignificant as compared with the funds at the disposal of the city hall; but they were sufficient. The campaign gathered power and momentum as it sped along. And be it said to the everlasting credit of the lawyers of Chicago, they did not fear or hesitate to openly align themselves against this proposed assault upon the Bench, even though they believed as the great majority of them certainly did, that the assault would be unsuccessful. And surely that belief was not unreasonable. Aside from the facts which I have mentioned above, this was purely a judicial campaign, which ordinarily excites but little public interest. The average voter as a rule knows next to nothing about the judicial candidates, and cares less. Purely judicial elections are ordinarily won by the party with the best organization. Eighteen per cent or less of the total vote has won judicial elections. In this case the city hall Republican organization, with its vast number of office holders, could deliver at the polls in obedience to its commands nearly if not quite twenty-five per cent of the total voting population; that would be sufficient in the usual case to utterly overwhelm any opposition. But in this instance, so thoroughly did the voters become aroused, sixty-five per cent went to the polls and the victory was decisive.

But does this most fortunate result establish the excellence of our present system, in a great metropolitan center like Chi-

cago, of choosing our judges? In my humble judgment it does not. It was only when the city hall ran up the black flag that we had any chance of so arousing the voters as to get out fifty per cent of the vote. And with a less total vote than that the city hall would have cornered the day. There was a great principle involved in this election, and the people can be aroused in support of a vital principle. But how often does that situation arise in a judicial election?

The people had mighty little to do with the selection of the individuals. A little coterie of men from the city hall, sitting around one table, named one slate; another little coterie, sitting about another table, named another slate. It happened that one set of men was plainly bent upon using the bench for the control of public funds and public offices, and perhaps for much more sinister purposes; and the voters very properly ignored the fact that a few worthy men lent their good names and entrusted their official fortunes to that enterprise. Individual candidates were scarcely discussed. The average voter knew almost nothing of the relative merits of the candidates as proper judicial timber

A few days after the election, pursuant to an employment by the Association of Commerce long antedating the election, I went to Springfield to argue before the Senate Committee against the Mayor's so-called five-cent traction district bill under which he proposed to pay a part or all of the street car fares of Chicago's permanent and transient population by taxation of private property, the exact share to be thus paid to be fixed by a popular vote. The Mayor appeared on the other side, accompanied by a well filled gallery from the city hall. Instead of attacking what I said, he attacked me; he described me as the man who in the constitutional convention a year ago proposed that the Cook county judges be named by the Governor sitting in Springfield. "He thinks," said the Mayor, "that the people of Cook county are not capable

of electing their own judges." I interrupted, saying that he was mistaken; that I thought the people of Cook county were eminently qualified to choose their own judges. "Oh," he said in manifest surprise, "you think that since last Monday?" I said, "I certainly do."

Of course, the people of Cook county are capable of choosing their own judges, if they will give the problem the time and attention it requires. I venture to say that any ten men and women of Cook county, of character and public spirit, whatever be their occupations, could if they gave sufficient time and study to the problem, choose one or a dozen satisfactory judges to serve upon our bench. But they would have to devote to the problem a fair proportion of their entire time, and they would have to be paid for their time, if like the ordinary citizen they were obliged to work for a living. But when we ask a million voters to select seventy-five judges from among two or three times that number of candidates—presented by individuals responsible to no one—not one voter in 10,000 (to speak with great moderation) has sufficient knowledge of all the candidates to make an intelligent selection; and the result is simply and clearly haphazard. It is no exaggeration to say that equally good results could be secured if the judges were chosen by lot from the Chicago Bar at large. Indeed it is the deliberate judgment of able and level-headed men in Chicago who have made a very careful study of the administration of the criminal law in this city, that such choice by lot of the judges of the Criminal Court would produce better results.

When a burden is placed upon the shoulders of the voters which they cannot discharge, they simply default. With our vast population, and the great number of judges to be chosen, the average voter realizes that he can exercise no intelligent choice; moreover, he has no expectation of getting into court, and he takes little interest in a judicial election. Those who vote in a purely

judicial election are ordinarily those led there by the party workers, and a few others. Why rail at a man as an unworthy citizen because he fails to go to the polls when he knows he can do no good if he does go? There is just as much reason for electing the school teachers of Chicago by popular ballot as to thus choose the seventy-five judges. What would be said of a proposal to elect by popular *ballot of all the voters in the state*, each of the circuit, probate and county judges in Indiana, or Wisconsin, or Michigan, or Iowa, or the whole of Illinois outside of Cook county? And yet in each of those districts the population is approximately the same as in Cook county. In smaller communities where the average voter knows more or less the judicial candidates—their history, their character, their reputation for legal ability—a choice by popular ballot is fairly satisfactory. But in a community like Chicago there can be no popular choice of judges. To call it by that name is merely to mislead. If the people actually could or would select their own judges, perhaps the enormous expense of a judicial election might have some compensation. But when the electors merely default in favor of a self-appointed coterie who make their living out of political work and have only selfish ends to serve, there certainly is little excuse for retaining a system of selection which costs approximately the entire salaries paid the judges for their full six-year term.

But the people *can* intelligently select a competent agent or agents who will select for them fairly competent and satisfactory judges. The voters of even a vast community like Chicago can and will at long intervals satisfactorily discharge the duty of selecting one or two or three judges of the Supreme Court; for the office is conspicuous and the election infrequent. The judges of the Supreme Court are certainly well qualified from their experience and observation to judge of candidates for the *nisi prius* courts. And if a system can be de-

vised which will not dangerously involve the Supreme Court in the dispensing of patronage, a selection by such a body would as nearly approach the solving of this difficult problem as any system that has ever been suggested.

Nearly two years ago, at the opening of the Constitutional Convention in Springfield, I presented a proposal that whenever a vacancy occurs in the *nisi prius* courts of Cook county, it should be filled by appointment by the governor; but the governor must choose from an eligible list of four or more names for each vacancy certified to him by the Supreme Court; the idea being that since the Supreme Court could not name the man, there would not be the danger which some fear from giving the court large appointive powers; and that since the governor is limited to a list certified by the court, he could not pay political debts by these appointments.

To avoid the objection that the judges for Cook county ought not to be appointed by a power over which the voters of that county had no control, it was provided that this certified list must be assented to not only by a majority of the whole court but by a majority of the judges from the seventh judicial district which is dominated by Cook county. It was further provided in this proposal that the names of all the judges so appointed should be placed upon the ballot at the end of six years of their service for a vote by the electorate at large upon the sole question whether or not they should remain upon the bench. If a judge should be retired by such a ballot his successor would be appointed in the manner outlined above. Surely a judge should be sufficiently amenable to the popular will if he is named by a responsible agent selected by the people, and may be discharged by the people themselves if he proves unacceptable.

I am pleased to say that this proposal has been adopted in the tentative draft of the constitution which was prepared before ad-

A master is liable for the result of a servant's negligence when the servant is acting in his business; when he still is engaged in the course of his employment. It is not the rule itself, but its application, that ever causes a doubt. The servant may be acting for himself. He may be engaged in an independent errand of his own. *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853, L. R. A. 1916A, 954, Ann. Cas. 1916A, 656. He may abandon his master's service permanently or temporarily. While still doing his master's work he may be also serving a purpose of his own. *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392. He may be performing his master's work, but in a forbidden manner. *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361. Many other conditions may arise.

No formula can be stated that will enable us to solve the problem whether at a particular moment a particular servant is engaged in his master's business. We recognize that the precise facts before the court will vary the result. We realize that differences of degree may produce unlike effects. But, whatever the facts, the answer depends upon a consideration of what the servant was doing, and why, when, where, and how he was doing it.

A servant may be "going on a frolic of his own, without being at all on his master's business." He may be so distant from the proper scene of his labor, or he may have left his work for such a length of time, as to evidence a relinquishment of his employment. Or the circumstances may have a more doubtful meaning. That the servant is where he would not be had he obeyed his master's orders in itself is immaterial, except as it may tend to show a permanent or a temporary abandonment of his master's service. Should there be such a temporary abandonment the master again becomes liable for the servant's acts when the latter once more begins to act in his business. Such a re-entry is not affected merely by the mental attitude of the servant. There must be that attitude coupled with a reasonable connection in time and space with the work in which he should be engaged. No hard and fast rule on the subject, either of space or time, can be applied. It cannot be said of a servant in charge of his master's vehicle who temporarily abandons his line of travel for a purpose of his own that he again becomes a servant only when he reaches a point on his route which he necessarily would have passed had he obeyed his orders. He may choose a different way back. Doubtless this circumstance may be considered in connection with the other facts involved. It is not controlling.

We are not called upon to decide whether the defendant might not have been responsible had this accident occurred while Million was on his way to his sister's house. That would depend on whether this trip is to be regarded as a new and independent journey on his own business, distinct from that of his master (*Story v. Ashton*, L. R. 4 Q. B. 476; *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490), or as a mere deviation from the general route from the mill and back. Considering the short distance and the little time involved, considering that the truck when it left the yards was loaded with the defendant's goods for delivery to its mill and that it was the general purpose of Million to return there, it is quite possible a question of fact would be presented to be decided by a jury. At least, however, with the wood delivered, with the journey back to the mill begun, at some point in the route Million again engaged in the defendant's business. That point, in view of all the circumstances, we think he had reached. *Jones v. Weigan*, 134 App. Div. 644, 119 N. Y. Supp. 441.

The judgment of the Appellate Division must be modified insofar as it directs the dismissal of the complaint and insofar as it fails to direct a new trial, and as so modified, affirmed, with costs to abide the event.

NOTE—Deviation by Driver From Route or Instructions as Affecting Employer's Liability.—Where a chauffeur, when ordered by his employer to take an automobile from the garage, which was situated in the rear of the house, to the front of the house, and the chauffeur drove to a drug store and purchased cigarettes for himself, the owner was not liable for injuries negligently inflicted by the chauffeur while returning from the drug store. *Healey v. Cockrill*, 133 Ark. 327, 202 S. W. 229.

Where a chauffeur, who had been instructed by his employer to drive an automobile from the garage to the employer's house, drove the car several miles in the opposite direction, the employer was not liable for injuries negligently inflicted by the chauffeur while returning from such trip. *Gousse v. Lowe*, Cal. App., 183 Pac. 295.

A chauffeur had nearly reached home on the return from a certain trip, made pursuant to orders of his employer, when he turned aside, almost in an opposite direction, on business of his own. While returning, after looking after his personal affairs, but while farther from home when he deviated from the route, he collided with another automobile. Held, that the employer was not liable. *Crady v. Greer*, 183 Ky. 675, 210 S. W. 167.

A chauffeur, under general instructions in such circumstances to return the automobile to the garage, took his employer to an entertainment one evening, and was directed to return for her at midnight, and instead of returning to the garage he went on a trip of his own, having noth-

ing to do with his employer's affairs, and while so engaged he negligently inflicted an injury upon another. It was held that his employer, the owner of the automobile, was not liable. *Tyler v. Stephan's Adm'x*, 163 Ky. 770, 174 S. W. 790.

A chauffeur in the employ of a public garage took an automobile and drove to a place of business, where he secured a battery which, in the course of his duties for the garage, he had left there to be charged, and after securing the battery he drove to a supply house and there purchased a pair of pliers for his own use, and while on the way back to the garage he negligently injured a bicyclist. It was held that the accident occurred while the chauffeur was acting within the scope of his employment, and that the owner of the garage was liable for his negligence. *Gibson v. Dupree*, 26 Colo. App. 324, 144 Pac. 1133.

Where a servant was engaged to drive an automobile truck for a bakery over a certain route, and, contrary to the instructions of his employer, made a trip off his route to take a person home, and after having done so was returning to the bakery when he ran over a boy in the street, it was held that at the time of the accident the servant was driving the truck in the scope of his employment. *Devine v. Ward Baking Co.*, 188 Ill. App. 588.

Where an owner permitted the chauffeur of his truck to drive to his dinner in the truck, he was liable for an injury caused by the negligence of the chauffeur after starting on his way to deliver the goods on the truck, and when the truck was where it would not have been but for the chauffeur driving it to his dinner. *Bila v. Bloomingdale*, 184 App. Div. 65, 171 N. Y. Supp. 434.

A chauffeur, who was in the continuous employment of defendant corporation, started to return with defendant's automobile to the garage, when he was compelled to stop and change a tire in the rain. His clothing became wet, and instead of returning to the garage immediately, he drove to his home in another part of the city, had his supper, changed his clothes, and started to return to the garage where he had work to do preparatory to his employment the following morning. In returning to the garage, he went out of his way several blocks to get some cigars, and while on this mission negligently struck and injured some children. Held, that the question whether the accident occurred while the chauffeur was acting within the scope of his employment was for the jury, and judgment against the defendant was affirmed. *Blaker v. Philadelphia El. Co.*, 60 Pa. Super. Ct. 56 (1915).

Where it appeared that an automobile, belonging to a city and driven by its chauffeur, was driven to the home of the city's superintendent of streets, on city business, the automobile being used in the street department; that after leaving the home of the superintendent it was the chauffeur's duty to take the machine to the garage; that he started to the garage, taking with him a young lady, who was not connected with any of the departments of the city; that he intended to deviate from his course in going to the garage in order to take the young lady home; that about half a mile before arriving at the point where he would leave the route to the garage for the purpose of taking the young lady to her home, the machine was struck by a street car and dam-

aged and the inmates were injured. It was held that the evidence justified a finding that at the time of the injury the automobile was still being used in the business of the street department of the city, the intended deviation from the route to the garage not yet having become operative. *Fitzgerald v. Boston & N. St. R. Co.*, 214 Mass. 435, 101 N. E. 1085.

CORRESPONDENCE.

ARE WELFARE MOVEMENTS CORRUPTING THE SOCIAL ORDER?

Editor, Central Law Journal:

Few forms of modern organization are more interesting to observe than that known as the Welfare Movement. From rather humble beginnings in the days before the war these organizations have since grown to immense proportions.

One form is the organization which has for its purpose relief work. Originally these organizations contented themselves with local drives for certain relief purposes. For instance, to raise a fund for the benefit of the University of Yazoo. Now these organizations are national in scope and international in purpose. Instead of raising thousands of dollars they raise millions and operate extensive organizations with a large staff of employees. With organizations of this type lawyers, as such, are little concerned.

Another form is that organized for the purpose of reforms of various natures. The basis of this latter species of organization seems to be the proposition that man is his brother's keeper. With the theological interpretation and with the abstract virtue of this proposition we are not concerned. The practical application of such a theory is an entirely different matter. That man should be his brother's keeper implies in practice that any man is capable of managing his neighbor but that no man is capable of managing himself. In actual operation there is also a great tendency to friction and confusion. We can imagine some difficulty, for instance, if Brother Brewer should undertake to manage Brother Prohibitionist, if Brother Farmer should undertake to manage Brother Wall Street, or if our Brothers in the Senate should undertake to manage our Brother who is President. The obvious difficulties and defects of this principle as a working principle have not affected its value as a talking point, and this idea has been sold to the American people for a great many millions of dollars.

After the idea is sold and millions collected or in course of collection, it seems to have fulfilled its purpose however. Its proponents very quickly divide the brothers into keeper brothers and kept brothers. Somewhat as the small boy decides that he will be pitcher in organizing a ball team in the back lots, the promoters of the movement decide that they will be keepers and the rest of us will be the people that are kept. The keepers themselves soon become subdivided into angels, figureheads and middlemen. The angels furnish the funds, the figureheads furnish the respectability and the middlemen run the machine.

What the financial resources of these organizations are is, of course, difficult to estimate. We have noted no published reports showing the amount of money collected and the distribution of the moneys, but from the extent of the activities of these organizations and the apparent number of employees, the resources must be vast. It is supposed that one of these organizations has an income of one million dollars per month, and it is estimated by persons who may know that at least one of the representatives of one of these organizations receives as compensation an income which would be acceptable to a railroad president.

What concerns us here is not the amount of moneys collected by these organizations, nor the application of these moneys. That can be left to the people who furnish the funds, but organizations of the reform type inevitably progress in their course until they procure the enactment of laws to further their purposes; and herein lies the menace.

Wisconsin is reported to have a statute making it a criminal offense to put one's foot on a rail in front of a counter while drinking a soft drink. In Texas it is said it is a crime to play pool. Another state has made it an offense to treat a person to a cigar and so on. How far this character of legislation will proceed we presume no one will venture to predict. Whether it will end in a form of invisible government, or whether it will stop at some intermediate point in its course is a question; but it is reasonable to suppose that these activities will continue as long as the funds hold out. No sensible person expects these thousands of well paid middlemen to cease their operations, resign their positions and go back to work.

This phase of the movement is not the important one to the lawyer. It is rather for the citizens at large. If the people wish this form of legislation they are entitled to it. If they do not wish it they will ultimately reject it.

In the meantime the passing of laws of this character is a great boon to that class of people well known in the cities and in the larger boroughs as the Underworld, viz: those people who live by law-breaking on the one hand and, on the other hand, the officials and those politicians of the crooked type who thrive by selling them protection. People of this character welcome such legislation with open arms, immediately capitalize it and turn it to their own ends. As their wealth increases their numbers increase as the locusts of old; and likewise their political power. Lawlessness becomes widespread, corruption in official life becomes common and respect for law generally falls very low. Sooner or later a race sets in between the reformers and the corruptionists to elect their favorite candidates to various administrative offices and they do not hesitate to attempt to elect their own candidates to the bench. It is at this point that the lawyers become particularly interested, but the question arises whether or not they should wait until this crisis is reached. With the forces of reform and the forces of corruption working toward the same end a momentum is soon gained which is difficult to resist. Perhaps resistance will at that time avail nothing.

It is not our purpose to pass on the merits nor on the limits of any proposed reform. Whether or not we should be compelled to smoke five cigars a day, or be prohibited from smoking at all, is a question on which others are quite as competent to pass an opinion as lawyers. Perhaps knives and forks should be banished from our tables. No doubt every person would gladly do away with knives and forks and eat with his fingers if by so doing even one misguided human being might be prevented from committing suicide. One thing, however, that we should demand is that, whatever the real or supposed merits of proposed legislation may be, the law passed shall be a workable one. Lawlessness and corruption constitute too big a price to pay for any abstract benefits. The flying machine that fails to fly is sent back for repairs again and again until it performs its function. We are reminded of Charles Lamb's story of Roast Pig. The Chinaman's house accidentally caught fire, burned down and roasted his pig to death. The Chinaman attempted to remove the pig, burned his fingers and placing them in his mouth discovered that roast pig is very good to eat. Thereupon all the Chinamen in the neighborhood burned down their houses in order to procure for themselves delicious roast pig. A method since has been found to

roast pig without burning down the house. If we are bent on sancitification by legislation let us find some method that does not involve destruction.

W. J. FITZGERALD.

Scranton, Pa.

ITEMS OF PROFESSIONAL INTEREST.

C. L. KAGEY AS MINISTER TO FINLAND.

One of our subscribers, Mr. C. L. Kagey, of Beloit, Kan., we learn, has just been appointed by President Harding as United States Minister to Finland.

This will take out of the practice of law in Kansas one of the three greatest trial practitioners of that state. This was the verdict given to us recently by a Kansas lawyer well acquainted with the lawyers of his state.

Mr. Kagey was recently appointed by the Governor of his state as one of Kansas' representatives to the Conference of Commissioners on Uniform State Laws, and there the editor of this Journal became his colleague and co-worker. We worked together on many difficult problems, and the suggestions made by Mr. Kagey were always given careful attention by the other members of the Conference.

It must be hard for a successful, active practitioner like Mr. Kagey, still in the very prime of life, to give up a large practice and assume diplomatic duties in a new country like Finland. But the change is probably a wise one from the standpoint of conserving health. Every busy trial lawyer would find that a sabbatical rest, a few years knocked off from the busy grind and given over to travel or some different pursuit, would add many years to his life and to his usefulness. Mr. Kagey was not known so well as an office adviser as a very successful trial lawyer. His ability in this respect called him into nearly every county in his state and secured for him retainers in much of the important litigation in his state.

Mr. Kagey has been a subscriber and friend of the *Central Law Journal* for many years and we have invited him to keep in touch with us by an occasional letter telling our subscribers something about the institutions, and administration of justice in this new country.

EDITOR.

HUMOR OF THE LAW.

"Why did you quit quoting poetry in your speeches?"

"I found that my constituents went home and read up on the poets instead of giving undivided attention to my remarks."

The Client—"I bought and paid for two dozen glass decanters that were advertised at \$6 a dozen, f. o. b., and when they were delivered they were empty."

The Lawyer—"Well, what did you expect?"

The Client—"Full of booze. What else does f. o. b. mean?"

"What's the idea of putting up that big sign reading, 'Forty miles to the city'?"

"That's a little idea of mine," said Constable Perkins of Chiggersville. "When a motorist bound for the city reads that sign he just naturally wants to see if he can't make the last lap inside of an hour. I stand down the road a piece and nab him."

While making a visit to New York, a man unmistakably of country origin was knocked down in the street by an automobile. A crowd instantly surrounded him with condolences and questions.

"Are you hurt, my friend?" kindly asked a gentleman, who was first among the rescuers, as he helped the stranger to his feet and brushed the mud and dust from his clothes.

"Well," came the cautious reply of one evidently given to noncommittal brevity of speech, "it ain't done me no good."—*Harper's*.

At the close of the last day's work of the Conference of Commissioners on Uniform State Laws, which recently convened in Cincinnati, Dean John H. Wigmore rose and solemnly moved that the Conference adjourn with a song of praise. He asked all the members to gather around a piano and quickly distributed slips of paper on which were typewritten the words of a chorus which he had improvised for the occasion. The members, old and young, judges, lawyers, college professors and all, joined in singing Dean Wigmore's composition to the tune of "Smiles." Here is the chorus.

"There are laws which need amendment;

There are laws which make us sigh;

There are laws whose obvious intendment

Is to make us permanently dry;

There are laws whose legislative craftsmen

Have been quite deprived of legislative sense,

But the LAWS of which we are the draftsmen

Make the rest look like thirty cents."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the
State Courts of Last Resort and of the Federal
Courts.

Copy of Opinion in any case referred to in this digest
may be procured by sending 25 cents to us or to the West
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1. **Agriculture**—Thresher's Lien.—Section 6855, Comp. Laws 1913, relating to threshers' liens, does not require that such lien shall show that the parties agreed on a certain price per bushel for threshing the grain upon which a lien is claimed; and such lien, if otherwise sufficient, is not rendered invalid because it shows that the parties, instead of a certain rate per bushel, agreed that the thresher should be paid so much per hour for the time employed in threshing.—*Hiam v. Andrews Grain Co.*, N. D., 183 N. W. 1016.

2. **Animals**—Negligence.—Where plaintiff's dog and defendant's cat had a fight in defendant's store, and after they had separated plaintiff reached down and took hold of the cat's paw, though she was wholly unacquainted with the cat's nature, and was bitten and scratched by it, her conduct was negligent, and she could not recover; and her conduct was not excused by her belief that the cat might again attack the dog, even though there was a danger of a recurrence of the trouble.—*Goodwin v. E. B. Nelson Grocery Co.*, Mass., 132 N. E. 51.

3. **Bills and Notes**—Attorney's Fee.—The statutes prescribing procedure in attachment suits make provision for "a return day" within the meaning of the statute prescribing the conditions on which agreements to pay attorney's fees in addition to the stipulated principal and interest may be enforced; and such agreements may be enforced in an attachment suit under conditions specified in the statute.—*A. W. Waters & Co. v. O'Neill*, Ga., 108 S. E. 35.

4. **Banks and Banking**—"Check, Draft or Order."—The words, "check, draft or order," as used in Gen. Stat. 1915, § 556, relating to certification of such instruments when the drawer does not have funds on deposit to meet them, include every written request made by any person to a bank for the payment of money, and it does not matter what the technical name of the writing is; it can be described by one of these terms, and a bill of exchange comes within these terms.—*Ingersoll v. Kansas State Bank*, Kan., 200 Pac. 291.

5. **Dishonor of Check**—A wrongful dishonor of a check by a bank will not justify

damages for "embarrassment and humiliation" of injured depositor, unless characterized by malice or oppression, warranting punitive damages.—*Grenada Bank v. Lester*, Miss., 89 So. 2.

6. **Intra Vires**—A national bank receiving for custody, care, and collection a note and mortgage of its customer, and thereafter forwarding the same for collection, is acting intra vires and liable for breach of its duty.—*Brandenberg v. First Nat. Bank*, N. D., 183 N. W. 643.

7. **Limitation on Powers of Officers**—Though courts require those who deal with bank officers to take notice of the limitations which the law places upon their powers, this does not preclude such officers from pursuing such a course as should characterize every possible transaction, whether performed individually or in their representative capacity.—*Citizens' Trust Co. v. Going*, Mo., 232 S. W. 996.

8. **Notice**—Where the cashier of a bank in taking title to certain notes was furthering his own interest and object and was not acting for the bank, it cannot be presumed that he would have notified the controlling officers of the bank of his own violation of the trust imposed in him by the parties transferring the notes, so that notice to him is not notice to the bank.—*Mays v. First State Bank*, Tex., 233 S. W. 326.

9. **Stock Purchases**—Where the directors of a national bank that is in failing circumstances purchase shares of its capital stock for the bank from other shareholders in violation of section 9762, U. S. Comp. St. 1918, the rights of innocent holders for value not having intervened, the validity of such transaction "can be questioned only by the United States, and not by private parties."—*Iowa State & Savings Bank v. City Nat. Bank*, Neb., 183 N. W. 982.

10. **Breach of Marriage Promise**—Time and Place Implied.—Where plaintiff, a young girl away from her home, agreed at the instance of defendant, her lover, to marry where they were, and then, on further reflection, determined not to do so, in absence of her parents and without their consent, but did not refuse to marry him later at her home, defendant was not justified in breaking the engagement.—*Goldstein v. Sachs*, Md., 114 Atl. 593.

11. **Carriers of Goods**—Bill of Lading.—Where a bill of lading was first made out to order of third person, and was received by such person, and a draft was drawn on plaintiff seller by such third person, attached to the bill of lading and forwarded to plaintiff, and was presented to plaintiffs, who did not pay the draft, but, without the knowledge or consent of the third person, caused the bill of lading to be detached from the draft, and drew a draft on defendant buyer, and attached the bill of lading to it, and defendant refused to pay the draft and rejected the shipment, held, that the unauthorized separation of the bill of lading from the draft of the third person did not give the plaintiff title to the goods, and they could not pass title to defendant; plaintiff being guilty of a tortious conversion of the bill of lading.—*Potash v. Cleveland-Akron Bag Co.*, N. Y., 189 N. Y. S. 375.

12. **Delivery**—Though it was the custom of carriers to tender delivery of cars consigned to Norfolk at Port Norfolk, yet where a bill of lading called for a delivery at a particular siding in Norfolk, the custom cannot modify the written contract of the parties, and until delivery is made at such siding demurrage cannot be charged.—*North Shore Improvement Co. v. New York, P. & N. R. Co.*, Va., 108 S. E. 11.

13. **Overcharge**—Persons having claims against a railroad company for overcharges on different shipments, unlike as to places or times of execution of the contracts, or of performance of the duties imposed, cannot join in a suit in equity to impress a trust on the assets and capital stock of the company in the hands of a reorganized company, to prevent a multiplicity of suits or otherwise.—*Ballew Lumber & Hardware Co. v. Missouri Pac. Ry. Co.*, Mo., 232 S. W. 1015.

14. **Carriers of Passengers**—Rates.—Under Pub. Acts 1919, No. 382, regulating rates for the transportation of passengers and providing in section 2 that it shall not apply to the rates of street or interurban railroads within

cities or within five miles of their boundaries, the rights of municipalities under franchise contracts fixing passenger rates were divested except such as are retained by the proviso in section 2.—*Detroit United Ry. v. Covert*, Mich., 183 N. W. 938.

15. **Constitutional Law.**—*Escheat.*—Under Const. art. 1, § 13, the state cannot by a mere statutory declaration, take away the right of the depositor to his bank deposit and appropriate to its own use his property therein, so that the depositor is a necessary party to any action by the state to enforce payment of the money due on the deposit into the state treasury, and the bank has the right to insist that the depositor be brought into the case as party by some valid process or notice, and can contend that the process and notice prescribed by Code Civ. Proc. § 1273, and St. 1915, p. 1106, § 5, providing for the escheat of bank deposits unclaimed for 20 years, do not constitute due process of law.—*State v. Security Sav. Bank, Cal.*, 199 Pac. 791.

16. **Non-Payment of Debt.**—Any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts violates Const. art. 1, § 15, prohibiting imprisonment for debt except in case of fraud.—*People v. Holder, Cal.*, 199 Pac. 832.

17. **Women as Jurors.**—Even if the omission of the jury commissioners to return women upon the panel were unlawful, and if the act recognizing the common-law qualification of men only as jurors were unconstitutional in that regard, still the question cannot be raised by the defendant, a man, as he was not thereby injured; as a white man cannot urge as an infraction of his rights that the rights of another race have been assailed so a man cannot complain because women are denied the same rights as men; such rights may be demanded only by members of the proscribed race or sex.—*State v. James, N. J.*, 114 Atl. 553.

18. **Corporations—Lease.**—Where the rent secured by a lease to a corporation had been punctually paid and accepted by the owner of the reversion, and there was no surrender of the lease or abandonment by the tenant, the lease was not terminated by the dissolution of the corporation by the Legislature and the expiration of the three-year period thereafter.—*Cumington Realty Associates v. Whitten, Mass.*, 132 N. E. 53.

19. **Purchase of Own Stock.**—The purchase by Colorado Corporation of its own stock contrary to Mills' Ann. St. Colo. 1912, § 996, is absolutely void, and cannot be validated by ratification by the corporation or its stockholders.—*Kissane v. Brewer, Mo.*, 232 S. W. 1106.

20. **Covenants—Building Restrictions.**—Covenants and agreements in deeds of lots in an addition imposing building restrictions on all the lots creates an easement in each lot in favor of every other lot.—*Peters v. Buckner, Mo.*, 232 S. W. 1024.

21. **Death—Conscious Suffering.**—In an action for the death of a railroad fireman brought under the federal Employers' Liability Act April 22 1908, as amended by Act April 5, 1910, the conscious suffering, if any, of the fireman before his death may be recovered for in the same action as the damage to his widow and children resulting from his death.—*Kilburn v. Chicago, M. & St. P. Ry. Co., Mo.*, 232 S. W. 1017.

22. **Deeds—Remainderman.**—Where a deed conveyed land in trust for a woman and her children during her life and the life of her husband, and at her death for the use of her husband and children, and after the death of her and her husband then to such children as they might leave surviving them, share and share alike, where the husband died first, a child who survived the wife took the whole land in fee to the exclusion of the children of a son who died before the wife but after the husband.—*Bell v. Brinson, Ga.*, 108 S. E. 47.

23. **Divorce—Alimony.**—A decree awarding complainant as alimony one-half of defendant's farm of a value of \$9,000, as well as a considerable amount of personal property, was erroneous, and the award should be reduced to one-third of the farm, although the divorce was granted on account of defendant's cruelty, it appearing that defendant at the time of the marriage owned a farm later sold for \$3,700, and that during the period of marriage he received by in-

heritance about twice as much as did complainant, who brought very little property into the matrimonial relation.—*Sattler v. Sattler, Mich.*, 183 N. W. 902.

24. **Electricity—Negligence.**—Under the rule that it is not necessary to defendant's liability for negligence that defendant should have apprehended the particular injury that did happen, so long as it was one that is a natural and probable consequence of the condition that was permitted to exist, held, that an electric light company was liable where a sagging telephone wire came in contact with its electric light wire and became charged, and a contractor examining a vacant house at which the telephone wires were left uninsulated and disconnected was shocked by the electricity passing through them, since it was not improbable that some one on the premises would have occasion to come in contact with the telephone wire in such condition.—*Johnson v. Kansas City Electric Light Co., Mo.*, 232 S. W. 1094.

25. **Trespass.**—A boy in the highway has no right, as one of the public, to climb trees by the roadside for sport or exercise, such right belonging to the adjoining landowner, and, where the boy is not climbing such a tree in the exercise of the proprietary right of the adjoining owner, by the owner's request or express or tacit permission, an electric company owes the boy no duty to insulate its wires passing through such trees to prevent injury from contact therewith, for the company as a lawful occupant of such trees, owes no duty to a trespasser or bare licensee greater than that owed by the owners of the trees, and is not bound to anticipate chance or casual trespass thereon.—*McCaffrey v. Concord Electric Co., N. H.*, 114 Atl. 395.

26. **Fraud—Misrepresentation.**—Relative to right to recover for fraudulent representations as to character of soil in sale of a farm, inspection of the premises by plaintiff did not as matter of law bar them from relying on defendant's representations.—*Morain v. Tesch, Mich.*, 183 N. W. 899.

27. **Garnishment—Non-resident.**—In a suit by attachment against a non resident defendant, who has only been served by publication, and who has entered no personal appearance, a garnishee in such suit may not plead for the principal defendant any defense which is personal to the defendant; and this is true, even though the garnishee is a carrier being operated by the United States government under the Transportation Act of March 21, 1918.—*Davis v. L. N. Dantzier Lumber Co., Miss.*, 89 So. 148.

28. **Highways—"Invalid."**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 6919, declaring that all male persons between 18 and 45 shall be liable to road work, except ministers of the gospel, invalids, etc., one afflicted with cancer, who had been advised by his physician not to do physical work, is an "invalid"; and hence where defendant and his physician testified that he was so afflicted and had been so advised, it was improper, in a prosecution for failure to work the road, to refuse to submit that issue to the jury.—*Walling v. State, Tex.*, 232 S. W. 1115.

29. **Insurance—By-Laws.**—An agreement on the part of a member of a fraternal benefit association to be bound by all future changes in the by-laws of the society that it may see fit to enact is subject to the implied condition that they must be reasonable notwithstanding *Sess. Laws 1911*, p. 425, § 8, for the reason that the obligation of every contract is protected from state interference by the federal Constitution.—*Modern Woodmen of America v. White, Col.*, 199 Pac. 965.

30. **Class of Employment.**—Where insured was an oyster opener, and was employed as such during the season when there was work in such occupation, but on close of season secured regular employment as a laborer, a more hazardous occupation than that of oyster opener, without notice of change of occupation to accident insurer, the recovery, on insured's death while employed as laborer, held limited to the indemnity specified for the death of a laborer, and not the indemnity made payable for the

death of an oyster opener.—*Stewart v. Massachusetts Acc. Co., Conn.*, 114 Atl. 657.

31.—Consummation of Contract.—In the absence of an agreement to the contrary, the acceptance of an application for insurance, when communicated to the insured, consummates the contract, without an actual delivery of the policy; but, if the application expressly provides that the policy shall not become effective unless and until delivered and received by the insured while in good health, the contract will not be consummated until the policy is so delivered and received.—*Mutual Life Ins. Co. v. Shoemaker, Miss.*, 89 So. 154.

32.—"Enlisted Man."—A draftee is an "enlisted man," within the purview of a life policy which allowed the insured to join the army, but required notice and payment of extra premium.—*Watson v. Sovereign Camp, W. O. W., S. C.*, 108 S. E. 145.

33.—Hospital Treatment.—Where a child born in a hospital is returned three months later to receive nourishment from its mother, who had previously returned for treatment of ailments attending childbirth, the child, while in the exclusive care of the hospital, is a "patient," and not a mere licensee; the arrangement being that compensation for the treatment of the mother includes compensation for the care of the child.—*Ford Hospital v. Fidelity & Casualty Co., Neb.*, 183 N. W. 656.

34.—Insurable Interest.—Where the barn destroyed by fire was insured in the name of plaintiff husband, but owned by the wife, an allegation of the husband's possession without any showing of right of possession and use of the barn does not show an insurable interest in him, in view of Code 1907, §4544, defining contract of insurance.—*Royal Exch. Assur. of London, Eng. v. Almon, Ala.*, 89 So. 76.

35.—Loss of Time.—Where loss of sight occurred contemporaneously with the accident, the insured, on recovery of amount specified in accident policy as indemnity for the loss of sight, to be paid with monthly indemnity "for the time between the date of accident and date of such loss," could not recover indemnity for loss of time under provision of policy providing for monthly indemnity for loss of time.—*De Leon v. Pacific Mut. Ins. Co., Cal.*, 199 Pac. 789.

36.—Proof of Disability.—Where the proofs of claim for a disability under a policy providing indemnity for sickness and accident specified poison ivy as the cause of the disability, and mentioned no disability resulting from accidental injury, a letter from the insurer, acknowledging the receipt of the proof of claim, stating that the adjustment came under the clause relating to sickness, and inquiring how long insured had been kept away from his business, did not waive its rights to proofs of disability from an alleged accidental injury, for which insured subsequently sought to recover.—*Ashwell v. Masonic Protective Ass'n, Conn.*, 114 Atl. 385.

37.—Representation.—Where an applicant for life insurance was requested in the application therefor to name all causes for which she had consulted a physician in the last 10 years, and to give the name and address of physician, the date of consultation, duration of disease, and remaining effects, and where, in her answer, she omitted to name one instance when she consulted a physician, and further failed to state what, if any, disease she then had, as informed thereof by the physician, her failure to do so was merely a representation and not a warranty, and did not, in the circumstances considered in the opinion, operate to void the policy.—*Plotner v. Northwestern Nat. Life Ins. Co., N. D.*, 183 N. W. 1000.

38.—Subrogation.—An underwriter of marine insurance, who had paid the loss resulting from a collision between the insured vessel and another, is subrogated by operation of law to the rights of the insured owner of the vessel against the other vessel in regard to the loss, and no assignment of such rights is necessary.—*Globe & Rutgers Fire Ins. Co. v. Hines, U. S. C. C. A.*, 273 Fed. 774.

39.—Intoxicating Liquors.—Apparatus for Making.—In order to convict a person of knowingly having upon his premises any apparatus for the distilling or manufacturing of intoxicating liquors, it is not necessary for the state to prove, unless it is so charged in the indictment, that a complete apparatus, or all the apparatus necessary for the making of whisky, was found upon the premises.—*Strickland v. State, Ga.*, 108 S. E. 124.

40.—Licenses.—Fee Not Tax.—The fee of \$1 for issuing a jeweler's license cannot be said to be in the nature of a tax imposed on the particular class of business.—*Samuels v. Couzens, Mich.*, 183 N. W. 925.

41.—Master and Servant.—Course of Employment.—Where an employer maintained a lunch room, where it served free lunch to its employees, and an employee, after being on that floor, returned to the floor below, where she had worked, and was injured in the elevator while leaving the building, the accident arose in the course of employment, whether the employment be deemed to extend over the noon recess or not, for the employer was bound to furnish a safe exit from the place of employment; hence recovery was governed by the Workmen's Compensation Law, and an action for negligence could not be maintained.—*Martin v. Metropolitan Life Ins. Co., N. Y.*, 189 N. Y. S. 467.

42.—Employees of Stockbroker.—Telephone operators, telegraph operators, stenographers and messengers employed by stockbrokers, are not covered by the Workmen's Compensation Law, and the stockbrokers are not "employers" within the meaning of such act.—*Westbay v. Curtis & Sanger, N. Y.*, 189 N. Y. S. 539.

43.—Foreman as Alter Ego.—A foreman, from whom longshoremen loading cargo on a vessel took orders and received tackle and other appliances, was not a fellow servant, but the alter ego of the employer, who was liable for his negligence.—*Kennedy v. Cunard S. S. Co., N. Y.*, 189 N. Y. S. 402.

44.—Interstate Service.—Whether an employee of a railroad company, injured while repairing a coal car which had been removed from an interstate train for repairs, was engaged at the time of the injury in the service of interstate commerce, is to be determined by opinions of federal tribunals.—*Louisville & N. R. Co. v. Pettis, Ala.*, 89 So. 201.

45.—Minor Employee.—Under Ky. St. Supp. 1918, § 4911, providing that in case any minor employee is injured while employed in willful and known violation of law, he may claim compensation under the Compensation Act, or may sue to recover damages as if that act had not been passed, a finding by the compensation board that a minor was employed in willful and known violation of the law is not a condition precedent to an action by an injured minor.—*Blanton v. Kellioka Coal Co., Ky.*, 232 S. W. 614.

46.—Newsboys.—Workmen's Compensation Law, § 2, second group 45, making the act applicable to hazardous employments in which four or more workmen are regularly employed in the same business, or in or about the same establishment, held to make the act applicable to an employer of four or more newsboys on trains; it being unnecessary for the four or more workmen to work in close proximity to each other.—*Ray v. Union News Co., N. Y.*, 189 N. Y. S. 486.

47.—Refusal of Operation.—An injured employee owes to his employer and to society the duty to adopt reasonable means to terminate his disability, so that the unreasonable refusal of an injured employee to submit to an operation for which his employer agreed to pay warrants the suspension of compensation payments for total disability until he does undergo the operation.—*Myers v. Wadsworth Mfg. Co., Mich.*, 183 N. W. 913.

48.—Test of Disability.—Under the Workmen's Compensation Law, the test of disability is the impairment of earning capacity in the employment in which the employee was work-

ing at the time of the accident, so that a motor tester, who was a highly skilled employee, is entitled to compensation for injuries totally disabling him from performing the duties of a tester, though he was employed by his former employer at an increased wage as a motor inspector, which was a similar skilled occupation in which he could use the skill acquired in his previous occupation.—*Geis v. Packard Motor Car Co.*, Mich., 183 N. W. 916.

49. **Municipal Corporations**—Street Improvements.—The term "drains," as used in Section 3812, General Code, is not synonymous or interchangeable with the term "sewers," as used in the same section. Each has a common, ordinarily accepted meaning of its own, and legislation by the council of a municipal corporation for the improvement of a street by paving, and providing for the construction of the necessary drains as an incident thereto, is not broad or comprehensive enough to clothe the city with jurisdiction to construct a sanitary sewer thereunder.—*Roebeling v. City of Cincinnati*, Ohio, 132 N. E. 60.

50. **Tax Lien**—The lien of special tax bills for local improvements is inferior to that for general taxes, where there is no provision to the contrary.—*Commerce Trust Co. v. Syndicate Lot Co.*, Mo., 232 S. W. 1055.

51. **Use of Sidewalk**—Proprietor of fruit and vegetable store has a right to make a reasonable use of the sidewalk in front of his store for the ordinary and necessary purposes of his business, but the right to such reasonable use does not entitle him to pre-empt the sidewalk in such a way as to constitute a constant obstruction to pedestrians, or to accumulate thereon garbage or refuse, and leave it indefinitely on the sidewalk, so as to constitute it a menace to others making a lawful use of the street.—*Ellis v. Friedlander*, N. Y., 189 N. Y. S. 545.

52. **Parties**—Special Pleading.—In a suit on a contract, where the allegations of the complaint and bill of particulars were not intended to be disputed, the defense that the contract was with a corporation of which defendants were agents, instead of with defendants personally, should be pleaded specially, in order that plaintiff may make the corporation a defendant and avoid circuity of action.—*Namura v. Machulsky*, Conn., 114 Atl. 672.

53. **Poisons**—Revenue.—To sustain a conviction under Harrison Narcotic Act, § 2, proof that the government was defrauded of revenue is not necessary.—*Hoyt v. United States*, U. S. C. C. A., 273 Fed. 792.

54. **Principal and Surety**—Supplemental Contract.—A surety on the bond of a company contracting with the government to dredge a certain channel and remove a certain number of yards held discharged by a supplemental contract, made without securing the surety's assent four years later, for additional dredging at another place, increasing the quantity of material to be dredged, notwithstanding a clause in the original contract permitting modification thereof.—*United States v. Poe*, Md., 114 Atl. 705.

55. **Railroads**—Interstate Commerce.—The question of whether a railroad engaged in interstate commerce can be held liable for punitive damages to automobile driver, injured at crossing, is governed by the state law, in the absence of a federal statute.—*Poole v. Southern Ry. Co.*, S. C., 108 S. E. 150.

56. **Sales**—Arbitration.—A contract for the sale of raw silk, reciting that "sales are governed by raw silk rules adopted by the Silk Association of America," but containing no provision for the arbitration of controversies as provided by such rules, nor any phraseology indicating that the reference to them was intended to include those providing for arbitration, should not be construed as constituting an agreement to relinquish all right to appeal to the courts, and to submit to arbitration under such rules any claim of either for breach of contract; the buyer not being a member of the association.—*In re General Silk Importing Co.*, N. Y., 189 N. Y. S. 391.

57. **Direction for Delivery**—Where a contract of sale required the buyer to give ship-

ping instructions as to carrier and transportation, and as to whether the goods should be transported by truck or by water, direction for delivery either to plaintiff buyer's factory or to some dock in New York was not sufficiently specific.—*Partola Mfg. Co. v. General Chemical Co.*, N. Y., 189 N. Y. S. 437.

58. **"Net Landed Weight"**—The expression "net landed weight," in a c. i. f. contract relating to sale of oil to be delivered at San Francisco, held to signify that the weight at the point of landing, San Francisco, must accord with the requirements of the contract although such expression was put in a column under the word "description," and preceding in that column were the words "bean oil not exceed 3% of fatty acid."—*Willits & Patterson v. Abekobei & Co.*, N. Y., 189 N. Y. S. 525.

59. **Unenforceable Agreement**—An agreement, made in connection with the sale of 200 pieces of tricotine, that the buyer should have the privilege of purchasing so much more of the cloth as the seller would be able to procure, which did not specify the quantity, or how often the privilege or option might be exercised and fixed no price, is unenforceable, regardless of the fact that the seller did make additional delivery of 16 pieces of cloth.—*Heyman Cohen & Sons v. M. Lurie Woolen Co.*, N. Y., 189 N. Y. S. 380.

60. **Taxation**—Deductions.—Under Tax Law, § 360, subd. 5, allowing an exemption or deduction from incomes for losses in transactions entered into for profit, though not connected with the trade or business of the taxpayer, one may not deduct a loss from gambling on horse racing.—*People v. Wendell*, N. Y., 189 N. Y. S. 550.

61. **Telegraphs and Telephones**—Refusal for Permit.—The action of the Public Utilities Commission, on application under Gen. Code, § 614—52, in refusing to permit the construction of a second telephone exchange in a village, held not unreasonable or unlawful, where it appeared that the previously existing telephone exchange was rendering good service, and was equipped to meet the demands of subscribers within its territory.—*Citizens' Exchange Telephone Co. v. Public Utilities Commission*, Ohio, 132 N. E. 59.

62. **Transmitting Money**—Where plaintiff, who could not read or write, requested defendant telegraph company to transmit money to his wife abroad, asking if they would guarantee delivery, and was told by the agent that the company would guarantee return of the principal amount, though not the charges, in case of failure to deliver, plaintiff is not bound by conditions printed on the receipt limiting liability of the company to its own lines, and exonerating it beyond them, unless he knew of such clause, or the circumstances charged him with notice thereof.—*Sturmer v. Western Union Telegraph Co.*, N. Y., 189 N. Y. S. 537.

63. **Vendor and Purchaser**—Rescission.—Where there are concurrent covenants to be performed by vendor and vendee, before the latter is enabled to rescind and sue for a breach of the contract, he must show tendered performance of such concurrent covenants on his part, and that he has demanded performance by the vendor of concurrent covenants on his part; but, in case a vendor is unable to perform at the time agreed upon for the passing of the title, tender of performance by the vendee is not required in order to enable him to rescind or to sue his vendor for a breach of the contract.—*Bernstein v. Kohn*, N. J., 114 Atl. 543.

64. **Time of Essence**—Where a contract for the sale of land made time of the essence thereof, a tender of deed by vendors at the trial, which was some time after purchasers had offered to pay the balance due, and had demanded a deed, and after the vendor had made a conveyance to another absolute in form, though intended as a mortgage, is too late to prevent rescission by the purchasers.—*Hogsd v. Gillett*, Mont., 199 Pac. 907.

65. **Wills**—Mistaken Belief.—A mistaken belief entertained by one that he has been wronged by another is not necessarily an insane delusion.—*Akins v. Akins*, Kan., 199 Pac. 922.

Central Law Journal.

St. Louis, Mo., November 11, 1921.

DANGER OF THE INCREASED BURDEN UPON THE FEDERAL SUPREME COURT FROM ITS CONTINUALLY EXPANDING DOCKET.

The editorial which appeared under the above title in the *Central Law Journal* for April 22, 1921 (92 Cent. L. J. 279), was recently called to the attention of the United States by Senator Spencer of Missouri, and ordered printed as a public document.

Our associate editor, Mr. Thomas W. Shelton, of Norfolk, Va., was the author of this editorial. Mr. Shelton, as chairman of the American Bar Association's Committee on Procedure, has been working for many years to relieve the Federal Courts by means of a threefold program, namely: (1) modernizing the procedure at law and in equity; (2) relieving the congested dockets, and (3) securing higher compensation for the judges.

This program is one which this Journal is glad to get behind. In 93 Cent. L. J. 255 (Oct. 14, 1921), Mr. Max Isaac of Brunswick, Ga., at our request, wrote the editorial on the Relief of Federal Courts and the Pay of Federal Judges. We are hoping that some senator will make this editorial a public document so that the terrible injustice toward our federal judges involved in the meager compensation paid to them may serve to arouse a proud and honest people to do their full duty.

We are delighted that the Journal is able thus effectively to contribute something to bring about the necessary changes called for by the program just set forth. With co-operation which we may reasonably expect on the part of the profession, we hope to see come to pass one of the greatest reforms of the present time, namely, the rehabilitation of the Federal Courts to meet the great demands of our present complex civilization and the centralizing tendencies of American law and its administration.

THE UNDUE EMPHASIS ON PROCEDURE IN AMERICAN DECISIONS.

The reform of procedure in England reduced the questions relating to pleading, evidence and trial practice to a degree almost negligible. A digest of English law shows very few items on these subjects, while any American digest is top heavy with the multitude of such decisions and the absurd importance attached to them.

In thinking over this matter, we decided to pick out, casually, two decisions from the recent reports. We took one from Ohio and another from Missouri. *Neal v. Hershman* (Ohio), 132 N. E. 19; *Tyon v. Wabash Railway Co.* (Mo.), 232 S. W. 786. In the *Neal* case, the question, and the only question, which demanded the consideration of one trial court and two courts of appeal, was whether the trial judge had the right to determine the issues of fact and direct a verdict in a case where plaintiff and defendant both filed motions to direct a verdict on the evidence. The trial court sustained plaintiff's motion and overruled that of the defendant. The defendant then sought to withdraw his motion and resubmit the case to the jury, which request the trial court denied. On review, the Court of Appeals affirmed the judgment, on the ground that defendant waived his right to go to the jury when he joined with the plaintiff in asking for a directed verdict. The Supreme Court, on another appeal, reversed the decisions of the two lower courts and ordered the case to be retried. On the point raised the Supreme Court said:

"The case at bar presented a jury issue. The motion made to direct a verdict at the close of the plaintiff's testimony was overruled, and the record discloses that exceptions were noted. To effectually save this question, the defendant was compelled to renew that motion at the close of all the testimony. This the defendant did and, immediately following, the plaintiff made a like motion. The Court, then, instead of disposing of the motions in the order made, passed upon the plaintiff's by sustaining it, and then proceeded to overrule the defend-

ant's motion. At this juncture, and next in order as appears from the record, defendant's counsel requested the withdrawal of his motion, and the submission of the case to the jury. From the record, as it appears, we are of the opinion that this request to submit the case to the jury came at the earliest moment at which it could consistently have been made. Had the court passed upon the motions in the order in which they were offered, as was done in the case of *Perkins v. Board of County Commissioners of Putnam County*, 88 Ohio St. 495, and, after the overruling of his motion, counsel for defendant had then delayed until the court had disposed of the motion of the other party, there might be some merit in the contention of the defendant in error. It appears to us in the light of what was actually done, as disclosed by the record, that the defendant was entitled to have the case submitted to the jury, and that the refusal of the court to so do deprived that party of a constitutional right, and that the action of the court in that respect was error."

In the Missouri case, the trial court sought to take a liberal attitude on an old rule of procedure and is called down by the Court of Appeals of that state. Plaintiff won a large verdict and within the proper time defendant filed a motion for a new trial, which the Court overruled. On preparing bill of exceptions, plaintiff's lawyer raised the point that defendant had not actually "excepted" to the Court's ruling in overruling the motion for a new trial and, therefore, refused to sign the "bill" which declared that such exceptions had been taken. The noting of such exceptions by the stenographer has been the practice in such state for many years. The trial judge added a memorandum to the bill, stating the fact that no exceptions had actually been taken, but that the practice had been simply to note such exceptions in the record, since it was often impossible for attorneys to be present at every decision day when some motion filed by them might be passed upon. The Court of Appeals reprimanded the trial court for presuming to add anything to the bill of exceptions and struck out from the bill the statement of the trial judge and

then proceeded to hear the appeal, as if the bill had been signed without explanation. The Court, however, makes the astounding declaration that if, in fact, the attorney had not actually excepted to the Court's decision on his motion for a new trial, his case could not be reviewed. In view of the fact that defendant succeeded in reversing the judgment because of substantial error in the case, one is led to rub his eyes in amazement and to wonder whether the failure to take an actual exception to a formal motion for a new trial, would, in fact, have stood in the way of the Court's dealing out justice between the parties, especially when the practice of attorneys in such a formal matter simply to note such exceptions as a matter of course was so well established.

This decision has every Missouri lawyer worried and the Court is being severely criticised for a pronouncement which revives memories of the barbarisms of common law procedure and is utterly out of harmony with the more liberal attitude of bench and bar on such matters of technical procedure.

But we have cited these decisions, not to praise or to condemn them, but to call attention to the emphasis which American lawyers and judges still attach to matters of procedure. Sir John Simon declared at Cincinnati, that the thing that surprised him most in reading American decisions, was the space and emphasis given to questions of procedure. In England, under the Judicature Act, errors in pleading or practice are so seldom, if ever, fatal, that lawyers rarely raise them on appeal. Mr. John D. Lawson, in an article on English procedures, recalls an instance where the Court of Appeals ordered a witness to appear before them to determine whether his testimony, which had been excluded, was merely cumulative, and finding that it was, they affirmed the judgment without referring to the point raised.

In America, lawyers and judges must be educated away from the idea that trial involves a test of skill in forens

maneuvering rather than an effort on the part of Court and counsel to determine the merits and the justice of the causes that are presented for decision. Not only should the Courts themselves refuse to render decisions in such a way and at such times as to put either party in danger of falling within the operation of some rigid rule of procedure, but they should rebuke any attempt of counsel on either side to "short-cut" a road to victory by recourse to some rule of procedure which, in the particular instance, does not serve the ends of justice.

NOTES OF IMPORTANT DECISIONS.

REFERENCE TO "SYMPATHY FOR DEFENDANT" IN JUDGE'S INSTRUCTION.—

The way of the trial judge in giving and refusing instructions is a hard one. He is damned if he do and damned if he don't. A certain trial judge in Ohio tried to instruct the jury not to let their sympathy sway their verdict in a case where the plaintiff had both legs cut off and his attorney had not, in his argument, concealed his appeals to the sympathy of the jury. But the Court said too much. He charged the jury that sympathy could not be taken into account because the issue was not whether the plaintiff had suffered a terrible injury, but whether the defendant was guilty of negligence. But the judge feared that the jury would think him unhuman, so he went on to say that everybody sympathizes with those who meet a terrible disaster. "We sympathize even with a poor dog that gets his leg cut off. A man without any sympathy is unfit to sit on a jury; in fact, such a man so devoid of feeling would be unfit to live." Then the Court went on to explain that the jury's sworn duty was to determine the guilt or innocence of the defendant company. "If it was innocent of any neglect," said the Court, "it should not pay a cent; if guilty, it should pay to the last cent." The Court went on in this way trying to show how a man could have sympathy and yet not allow his sympathy to control his judgment. The Supreme Court of Ohio, however, in reversing a verdict for \$75,000, declared that the Court's charge was misleading. *Toledo, C. & O. R. R. Co. v. Miller*, 132 N. E. 156. The Court said:

"The plaintiff had suffered the loss of both of his legs, and the case was one in which human sympathy for the plaintiff was natural-

ly unavoidable. Certainly the normal individual juror could not help but entertain feelings of sympathy for the injured plaintiff, but it is quite a different question where the judge himself uses language which is calculated to engender sympathy or to induce any enlarged verdict for that reason. It is one thing for the juror to possess the attribute of sympathy toward his fellowman, but it is quite another for the court, by act or word, to use expressions exciting the sympathetic tendencies of the individual juror. The case was being submitted, the evidence was all before the jury, counsel on both sides had made their arguments, and this was the last expression in the case by either Court or counsel. * * * The charge contained its own condemnation, as a reading of it will at once disclose. Its genesis may have been produced by the remarks of counsel. However, we are not advised from this record whether that be true or not; but, if it were true, the language of the Court was not calculated to curb the effects of such arguments."

RIGHT OF MOTHER OF ILLEGITIMATE CHILD TO SUE FOR CHILD'S INJURY WHERE STATUTES GIVE MUTUAL RIGHTS OF INHERITANCE.—

We believe that the Maryland Court of Appeals was unduly strict and severe in holding recently that a mother may not sue for the wrongful death of her illegitimate child when such child and its mother, under the Maryland state law, have mutual rights of inheritance from each other. *Smith v. Hagerstown & Frederick Railway*, 114 Atl. 792.

In this case the plaintiff brought suit for the wrongful death of her illegitimate child under a statute which provided that an action might be maintained "for the benefit of the wife, husband, parent and child of the person" whose death was caused in the wrongful manner specified in the statute. The defendant demurred, contending that a parent of an illegitimate child was not such a parent contemplated by the statute, because an illegitimate child could not confer a right of this kind upon his mother. The plaintiff contended that a statute of Maryland which gave mutual rights of inheritance to a mother and her illegitimate child practically made them legitimate as to each other and that therefore she should recover. The Court, in favoring the contention of the defendant, said:

"At common law an illegitimate child could neither inherit nor be entitled to receive in the course of distribution from either parent, and conversely the parent could have no claim to any interest or right which the child might have possessed, and this applies as well to cases arising out of a wrong done as it does to property to which the illegitimate had acquired a right, title, or become possessed for a death caused by negligence by reason of a

tort. Under the common law the right of action died with the person so injured or killed. But following the passage of what is commonly referred to as Lord Campbell's Act, the statute was passed in this state by which a new right of action not theretofore known was given, and the Maryland statute will be found in the Revised Code (art. 67, § 2). Under this the legislature provided that an action might be maintained for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, to be brought in the manner provided in the statute. Can this legislation give rights to illegitimate children for the benefit of the mother of such illegitimate? In the Code (art. 46, § 30) it is provided that the illegitimate child or children of any female and issue of any such shall be capable in law to take and inherit both real and personal estate from their mother or from each other or from the descendants of each other, as the case may be. It will be observed that this statute is limited to taking or inheriting real or personal estate, and a few of the courts of this country, where similar statutes have been enacted, have found in the adoption of the particular statute a legislative intent favorable to an action founded on a tort to the illegitimate for the benefit of the mother in tort. The great weight of authority is adverse to this view, as will appear from the citations collected in 3 R. C. L., p. 769, and 17 C. J., p. 1219."

The courts, it is true, are divided on this question, but irrespective of the "weight of authority" we respectfully contend that there is neither logic nor fairness in the rule adhered to by the Court. Nor does the citation in *Corpus Juris* sustain the Court. The decisions cited on page 1219 of Vol. 17 are to the effect that in the absence of any statute giving to the mother and illegitimate child reciprocal rights of inheritance, the mother or child cannot sue for the death of the other, for the sufficient reason that the legislature, in passing a statute giving a right of action for death by wrongful act, must be presumed to have intended to confer such rights or legitimate relations. But on page 1220, the rule is stated differently, where by statute such reciprocal rights of inheritance are given. The rule is stated thus:

"But where there are statutes substantially legitimizing bastards as to the mother, or conferring on them the rights to inherit or transmit inheritances from or through the mother, a mother may recover for the death of her bastard child, and such child may recover for the death of its mother, under the designations of 'parent,' 'child,' or 'next of kin.'"

This rule is logical because, as to the mother, such statutes practically establish a legal relationship of parenthood and childhood. This rule is also in harmony with the humanitarian concepts of the present day toward illegitimate children, which the legislature must

be presumed to have had in mind. In most states, a legal relation of parent and child is established between the mother and her illegitimate child, and there is no rule of the common law or of public policy which should lead the courts to deny the existence of such a relation under statutes conferring rights of action upon parents of children for death by wrongful act.

THE PAYMENT OF ROYALTIES TO SUCCESSORS IN INTEREST TO LESSORS IN OIL LEASES.

The general subject of paying royalties to successors in interest of a lessor in an oil lease has been the subject of considerable controversy in the courts, and, inasmuch as the failure to pay the proper party such royalty, or his proper proportionate part thereof might be fraught with disastrous consequences to the lessee, the subject is of very great importance to the oil industry.

Successors in interest to the original lessor may be divided into three classes, to-wit: (1) devisees, (2) distributees in partition, whether by conveyance or decree, and (3) vendees. Inasmuch as the courts will give to an instrument, whether a will or deed, that effect the parties intended when such intention is arrived at according to the rules of law, a devisee or the distributee in partition, or a vendee, might have different rights as to royalties, and hence I have divided them into these classes.

Practically all leases have a provision, in substance, that the lessee is given the right to, or will commence the drilling of a well in a stated period from the date of the lease, and if he fails to do so he shall have the right to procure extension periods in which to begin such drilling by paying certain stated sums on or before the beginning of such extension periods; that such sums may be paid to the lessor in person or be deposited to his credit in a named bank, and default in so doing will forfeit the lease:

that if oil is found and produced, a designated part thereof, usually one-eighth, will be paid to the lessor. Then follows a provision, usually in substance, that all the terms and conditions in the lease shall extend to and be binding upon the successors, heirs and assigns to the parties to the instrument. Many leases contain special provisions attempting to control, by contract, the rights of successors in interest to a part of the leased land. Inasmuch, however, as the courts, where there is a special contract made, will usually give effect to such contract, these specific contracts are not of very general interest and will not be discussed herein, and only the lease which provides in general terms that the instrument shall operate upon, and be binding on, all of the successors in interest, heirs and assigns of the parties to the contract, will be.

For convenience in discussion, the matter will be divided into three parts:

First: As to the payment of royalties to devisees.

Second: As to the payment of royalties to distributees in partition.

Third: As to the payment of royalties to vendees of part of the land leased.

As to Payment of Royalties to Devisees of the Lessor.—The first case in which this question arose was *Wettengel v. Gormley*.¹ It appeared that the testator was the owner of three contiguous farms containing together 600 acres of land, who, in the year 1888, made an oil lease to one Tomlinson, covering all the land, which was to run for fifteen years, and reserved a royalty of one-eighth upon all the oil produced. The lease contained the usual provisions that it was understood between the parties to the agreement that all the conditions between the parties should extend to their heirs, executors and assigns. After the execution of the lease Gormley died, leaving a will in which he devised to his three children, in fee, making no mention of the lease, the three farms, one to each. The lessee had

put down several oil wells and was producing oil therefrom, and all of the wells happened to be on the farm devised to James T. Gormley, and he claimed the entire royalty. The other devisees brought suit, setting up that they were entitled to that proportion of the royalty that their lands were of the whole of the lands described in the lease. The Court states:

"The question is thus seen to be, who is entitled to the royalty reserved by the ancestor? Should it be divided between the three devisees in proportion to the acreage held by each, or should it be paid to James T. alone?"

To show how the Court reasoned in arriving at its conclusion, I quote from the decision:

"If the lease had been the ordinary agricultural lease, reserving a fixed annual rent payable in money, it would not be doubted that the fee descended to the devisees subject to the estate for years held by the tenant. The lessor could not change the rights of the lessee, or disturb his covenants, by a division of the land into parts, and a devise of these parts unto separate devisees. All the devisees together take the place of the deviser, and receive the rent due as an entire sum from the tenant. It would not matter that the grain was grown on one of the divisions, the grass upon another, while the third was unimproved and covered with forest: their interests would be several as to each other under the terms of the will, but as to the tenant they would be undivided under the terms of the lease made by their ancestor, and covering the land at the time of his death. But this was not an agricultural lease. It was an agreement known as an oil lease. It conferred an exclusive right upon the tenant to take the oil that might underlie the whole 600 acres, and gave him fifteen years within which to take it. It was, in its legal effect, a sale of the oil, for the removal of which the surface and the sub-surface were subjected to the necessary servitudes. The subsequent division of the body of the land by the lessor could not divide or diminish the privileges of the lessee or change his covenants. The lessee may locate his wells where he pleases, regardless of the interests of the devisees or his lessor. He may distribute them over the 600 acres, or locate them all on one of the divisions. He may crowd

(1) 160 Pa. 559, 28 Atl. 934.

the lines of the adjoining divisions so as to enable him to draw the oil from them without drilling upon them, and in this manner deplete, ultimately, the whole territory by operations conducted on the farm or one of the devisees."

The Court also points out the difference between this character of contract and a lease for solid minerals, stating that solid minerals cannot move from one place to the other, and that no amount of mining on one tract can deplete an adjoining tract of its minerals. From these considerations the Court held that the devisees under this will were entitled to the royalty in proportion to the acreage they got from the ancestor, notwithstanding all the wells were drilled on one farm or on one devisee's tract.

The same will and lease came before the Court in *Wettengel v. Gormley*,² and the doctrine was reaffirmed. The Court elaborated on the proposition and gave some additional reasons for its conclusion. The Court held that the legal operation of the lease, as between lessor and lessee, was to sever the leasehold from the freehold estate; that after the execution of the lease the exclusive right of access to the oil-bearing stratum was in the lessee, whose duty it was to develop and operate the leasehold estate for oil and gas. So it is declared the estates were separate, independent and in independent hands. The one was personal, an estate for years; the other was real, a fee simple; that the right to receive or demand the rent was a chose in action that would fall under the laws of Pennsylvania to the personal representative of a decedent. The Court held that Gormley devised only the fee estate, subject to the lease, and it was only the *surface* that was divided between the devisees, and each took a surface right or fee estate subject to the common burden of the lease. As the lease covered all the land, so the rent may be said to issue from each and every part of it, and that the royalties belonged to the owners of the 600 acres, and not to the owner of any subdivision of it. So it is

receive such proportion of the royalty, no reaffirmed that each of the devisees should matter from what portion of the 600-acre tract covered by the original lease such royalty was produced.

At least one of the reasons given by the Pennsylvania Court in this case is not of universal application. For instance, in Texas, Oklahoma, Louisiana and California, and perhaps other states, the common law rule that personal property goes to the administrator and real estate to the heir, does not obtain. The other reason chiefly relied upon that there was a severance of the two estates, mineral and surface, by the execution of the lease may be considered doubtful. It is settled almost everywhere, and in Pennsylvania as well, that a lease, such as was here discussed, does not confer any title to the oil and gas in place on a lessee. The only effect of such an instrument is to transfer to the lessee the right which the lessor had to mine for and reduce to possession these substances. For this reason it is difficult to see how such a contract would create a severance of the two estates. It would be more accurate to say that it created a new estate in the lessee, to-wit: an estate for years. However, if such had been the statement, it probably would follow that the devisees took the fee title incumbered by the lease, just as they would have taken it had the subject been agricultural lands, and as pointed out by the Court in the first decision under this will, if the instrument had been an agricultural lease, the devisees as a whole would have been entitled to rentals from the leased premises as a whole, and it would not matter that grain was grown on one of the divisions, grass upon another, while the third was unimproved and covered with forest.

Of course, in determining the rights of devisees under a will devising oil land which has been leased by the testator, a Court might legitimately determine that a certain devisee was entitled to all the oil produced from the tract devised to him or

(2) 39 Atl. Reporter, p. 57.

vice versa, by determining the intention of the testator from the provisions of the will and the circumstances surrounding the testator, and in existence at the time the will was made. For instance, if a will was executed soon after a lease was executed, and before any operations were commenced on any part of the premises and the testator in his will devised the tracts in severalty to his devisees, it might be properly concluded that he did not intend that each devisee should have all the royalties proceeding from wells on the tract devised to him, because, supposedly, the lessor would not know that any one of the tracts was more valuable than the others, or that there was even a probability that such was the case. On the other hand, if the will were executed after production was had on one of the tracts devised, the court could legitimately conclude that it was the intention of the lessor to give the devisee of that tract all of the royalty oil produced therefrom, because the testator would know at the time of executing of the will that the tract was oil producing land, and would not know that the other tracts were, and his intention to give to this devisee such royalty could be very properly inferred. It would seem, therefore, to the writer that in will cases where the successors in interest are devisees of the leased lands, that the general proposition should be established that, *prima facie*, the royalties would be divided among the devisees in proportion to their interest in the lands, but that such general rule would be varied by taking into consideration the particular circumstances and facts under which the will was executed, and deciding the question according to the intention of the testator. Without, however, giving any consideration to this question, in the case of *Gillette v. Mitchell*,³ the Court of Civil Appeals in Texas, for the First District, followed the rule in *Wettengel v. Gormley* as to devisees where there was production had on the land prior to the death of the testator.

(3) 214 S. W. 619.

In this case the estate devised consisted of 42.2 acres of land, cut up into small tracts. Doubtless this fact influenced the Court in following the doctrine in *Wettengel v. Gormley*, it being very apparent that wells drilled on these small tracts would draw oil from adjacent tracts.

Under the peculiar statutes of Texas, this case could not be carried to the Supreme Court, and that Court has never been called upon to decide the question.

As to the Payment of Royalties to Distributees in Partition—The question here under discussion first arose in West Virginia.⁴ The facts were that in the year 1898, by the death of their mother, Effie Lynch and others became the owners of 54 acres of land, and in 1905 they divided this land by deed, executed one to the other, setting apart to each his share in severalty. In the year 1913, all of the owners joined in a lease covering the whole of the property, describing the land as a single tract, with no reference to the preceding partition. A producing well was drilled on one of the segregated tracts, and the owner of such tract claimed all of the royalty to the exclusion of the other lessors. The owners of the other tracts claimed that they were entitled to a part of the royalty and contended that it ought to be divided in proportion to the acreage owned by each in the partition. It will thus be seen that the case is hardly in point on the question we are discussing, since the land was divided prior to the making of the lease, and the case before the Court was really one where several distinct and separate owners put all of their land into one lease providing for the payment of royalty in gross. The Court refers to the cases of *Harness v. Eastern Oil Co.*,⁵ and *South Penn Oil Co. v. Snodgrass*,⁶ where it had been held that where two owners of two separate tracts of land put the same into one lease, development on one tract satisfied the cov-

(4) *Lynch v. Davis*, 79 W. Va. 447, 92 S. E. 427.

(5) 49 W. Va. 232, 38 S. E. 662.

(6) 71 W. Va. 438, 76 S. E. 961.

enants of the lease, and the lessee could not be compelled to drill on each tract separately, and then says:

"For the purposes of construing this lease we must assume that when the parties made it they did so with knowledge of the construction placed upon such contracts by this court in the cases above cited, and we must further assume that they knew of the vagrant character of oil in place. We are not aided here by any acts of the parties done under the lease, nor by any construction given the lease by the parties themselves, but must construe the paper upon its face.

"If we give this lease the construction contended for by the defendant, Lola M. Davis, that is, that she is entitled to all of the oil produced from the well drilled upon her land, we say that the drilling of such a well is sufficient performance upon the part of the lessee to keep alive his rights under the lease as to the lands of all of the lessors, and that because of the vagrant character of this substance, the whole thereof may be extracted through a well, or wells, so located, and the lands of the other parties entirely devastated of the oil and gas underlying the same without any compensation to them whatever. It is contended that a more reasonable construction of this paper is that the parties, knowing the rights of the lessee under the lease, as laid down in the decisions above referred to, and being acquainted with the fugitive and vagrant character of oil and gas in place, for convenience leased their several tracts of land as one tract, contemplating that whatever oil was produced from the whole tract of land should be paid for to them jointly."

The Court then proceeds to construe the lease, holding that it was the intention of the parties to pool, as it were, the royalties, each securing his proportion thereof, notwithstanding all might proceed from one tract.

As before stated, this case is hardly an authority on the proposition that successors in interest to a lessor must divide the royalties proceeding from their severed tract with the other owners, because really and truly, the Court arrived at its conclusion by considering that the parties had contracted that the royalties should be divided in proportion to the acreage of their tracts. The Court does, however, refer to *Wetten-*

gel v. Gormley and approves the doctrine of that case.

The question again came before the same court in the case of *Campbell v. Lynch*.⁷ In this case the successors in interest were also distributees in partition. The ancestor leased a tract of land in his lifetime, and prior to any operation on the land the same had been partitioned by decree of Court between the heirs and the widow, giving her an assignment of dower, and oil was produced on one of the tracts. The Court held that the royalties should be divided among the distributees of the estate in proportion to their interest in such estate, largely on the ground that when the partition was made, no mention was made of the lease, either in the pleadings or in the decree, and that, therefore, what was really divided was the estate in reversion, the Court holding that there were two separate estates. The Court enters into an elaborate discussion of whether a lease of this character brings about the relation of landlord and tenant, whether it creates a severance, etc., and says in part:

"That the lease on a single tract of land broken up into several subdivisions by a partition or by conveyances is not segregated and converted into as many distinct leases as there are subdivisions, is conceded. That could be done only with the consent and co-operation of the lessee. As to him, the lease and its subject, the tract of land, are entireties. After, as well as before, the division there is one lease of one tract yielding, when productive, one royalty or rental in the aggregate. The subject of the lease is divisible, just as a tract of land subject to any other lease is, and so is the royalty or rent, in the manner in which other rents are apportionable. The rent is an entire thing arising out of the whole tract of land. Though the royalty, oil or gas rental comes from a certain well or certain wells, it is not legally the rent or return of the wells or the severed tract of land on which they are located. It is rent of the whole tract covered by the lease. Production and delivery or payment thereof maintain the lessee's hold upon the entire tract. Mere sale

(7) 81 W. Va. 374, 94 S. E. 739.

or conveyance of the portion of the tract on which the well is, without a special provision or contract touching the royalty, whether before or after the drilling, cannot change the character of the lease or the rent. In legal contemplation the wells are not drilled on the several portions, as under a lease of that portion. They are drilled under the lease as made, which binds and holds all of the parts, after division, as it did before."

So the Court concluded in this case that the rentals should be paid to the different owners in proportion to their holdings, and not to the owner of a specific tract on which the wells were drilled. This decision was made by a divided court, and in the case of *Pittsburgh & West Virginia Gas Co. v. Ankrom*,⁸ it was criticised and distinguished from a case where the successors were vendees.

Payment of Royalties to Vendees of Lessor—In *Pittsburgh & West Virginia Gas Co. v. Ankrom*,⁹ the controversy arose by reason of the original lessor having become bankrupt and the leased land being subdivided by the trustee and sold out in parcels. Oil was produced on one of these parcels and the other purchasers claimed a right to participate in the royalties therefrom. The majority of the Court holds that no such participation should be allowed, and that the purchaser of each tract was entitled to all the royalties proceeding from his tract. *Lynch v. Davis*,¹⁰ is distinguished on the ground that the point really decided in that case was, that the lessors had pooled the royalties and that the decision was made on a construction of the instrument. *Campbell v. Lynch*,¹¹ was also referred to, and the writer of the opinion stated he thought that decision should be overruled, but that one of the judges thought the case might be distinguished on the facts. The result is that in West Virginia, unless there is a change in the personnel of the Court, the law is established that successors in interest to a

lessor acquiring specific parts of leased premises, by purchase, at least, are entitled to all the royalties from wells drilled on those specific parts. Two of the ablest Judges, however, on that Court, Poffenbarger and Williams, vigorously dissented for reasons stated in *Campbell v. Lynch*, and, therefore, the rule may yet be changed in West Virginia.

The Supreme Court of Ohio, in the case of *Northwestern Ohio Natural Gas Co. v. Ulery*,¹² has decided the question in accordance with the majority opinion in the West Virginia case, above referred to. The owner of two adjoining tracts leased them in one instrument and subsequently conveyed one tract to one party and the other to another. A well was finished on one tract and the purchaser claimed all of the royalty. The Court held that the purchaser of the tract was entitled to the whole of such royalty, and the doctrine of *Wettengel v. Gormley* was disapproved.

In the case of *Osborn v. Arkansas Territorial Oil & Gas Co.*,¹³ the Supreme Court of Arkansas passed on this question. The owner of an 80-acre tract of land executed an oil and gas lease thereon. Before any production was had he conveyed 40 acres of the tract and subsequently conveyed half an acre of the remaining 40 acres. A well was drilled on the half-acre tract. It was held that the purchaser of the half-acre tract was entitled to all the royalties. The question had also been decided in the case of *Fairbanks v. Warrum*,¹⁴ on entirely similar facts, and it was there held that purchasers of the respective tracts were entitled to all the royalties produced from wells on such, and no participation would be allowed.

Another case discussing the question and apparently holding to the contrary of the last cited cases, is *Higgins v. California Petroleum & Asphalt Co.*¹⁵ This case, however, could be distinguished on the ground

(8) 97 S. E. 593.

(9) *Supra*.

(10) *Supra*.

(11) *Supra*.

(12) 68 Ohio St. 259, 67 N. E. 494.

(13) 103 Ark. 175, 146 S. W. 122.

(14) 56 Ind. App. 337, 104 N. E. 983, 1141.

(15) 109 Cal. 304, 41 Pac. 1087.

that the contract of lease being made by two different owners for tracts of land owned by them in severalty were put in one lease, and that, therefore, there was a pooling agreement inferrable from the contract itself. The facts were that two owners of adjacent tracts leased the two tracts in one instrument providing for payment of royalties in gross, and production was had on one of the tracts. For a number of years the royalty was paid to the lessors jointly, and this circumstance influenced the Court in its decision, since it was a construction by them of the contract. After production was had and royalties were paid, the lessee bought one of the tracts, the one on which production had been procured, and then set up the claim that it was not required to pay royalty to the other owner. The Court denied this claim and held that a portion of the royalty must be paid to the owner of the other tract. The reasoning of the Court, however, would indicate that in the Court's opinion the royalty should be apportioned, even if there had been no construction of the contract by the parties.

That the matter will be determined by the intention of the parties is distinctly shown in the case of *Ryan v. Oil Co.*,¹⁶ where it is held that where two owners put their lands into one lease, parol evidence will be admitted to show that they had agreed and understood that each would be entitled to the royalty from wells on his tract, notwithstanding there is nothing in the lease to indicate or show such.

In the cases of *Kimbley v. Luckey*,¹⁷ and *Pierce v. Schacht*,¹⁸ the Supreme Court of Oklahoma has put itself in line with the doctrine of Ohio, Indiana and the last case in West Virginia.

In the *Kimberley* case the Court first decided in accordance with the doctrine of *Wettengel v. Gormley*, but on rehearing receded from such doctrine and followed the contrary one. The decision is perhaps weak-

ened by reference to a statute in Oklahoma as to the effect of a warranty deed, and also by reference to the fact that parties in Oklahoma dealing with such property had for years conducted business on the idea that a purchaser of a given tract of land would be entitled to all royalties proceeding therefrom, and that to establish a contrary doctrine would bring about endless and complicated litigation. On this point the Court says:

"To apply the common law rule of apportionment of rents to such class of cases would be destructive of titles, at least of such titles as had been acquired by purchase, and would work interminable confusion and bring about an almost endless amount of litigation, and that in cases where the parties had, from the earliest days of the business, in good faith made land ownership the basis of title to production."

It will thus be seen that the doctrine of *Wettengel v. Gormley* has been repudiated everywhere except in Texas, unless that case is confined to the specific facts of a will executed before production. It is submitted, however, with diffidence, that the doctrine of *Wettengel v. Gormley* is more consistent with general principles and will lead to less confusion and injustice than the contrary doctrine. If oil and gas leases were considered by the courts as establishing the relation of landlord and tenant, pure and simple, and that, therefore, all the lessor had after making a lease was title to the reversion and that royalties to be paid were governed by the rules governing payment of rent, then the common law doctrine of apportionment of rent on leased premises would be immediately applicable, and this would allow participation in royalties and all difficulties would disappear.

It is, of course, well established that a purchaser of any part of leased premises under an ordinary lease, simply participates in the rental of the entire premises. It would not matter if he bought the most profitable part of the farm, he would not be entitled to the rent supposedly being paid for such part, but only to a pro rata share of the entire rental. On the other hand,

(16) 46 S. E. 559, W. Va.

(17) 179 Pac. 928.

(18) 181 Pac. 731.

it is conceded by all courts that no transfer of any part of leased premises in an oil and gas lease can affect the rights of the lessee. He can drill wells where he pleases, can drill them all on the tract sold or on the tract retained; or if the entire tract is sold in parcels to different parties, he can confine his operations to any one of the tracts sold. Not only can he thus deprive or indefinitely postpone any royalties coming to owners of other parts of the land on which he has not drilled, but he can drill his wells so close to the lines of adjacent tracts as to draw the oil and gas from under such tracts and thereby destroy the value of such tracts, and it would be manifestly beyond the power of any owner of non-drilled tracts to compel him to drill on his tract, or to refrain from drilling near the line.

The Supreme Court of Oklahoma, in the above cited case, intimated that in such case the owner of the non-drilled tract would not be without some remedy. The Court does not point out, however, any remedy, and it is inconceivable that such owner would have any remedy which would not interfere with and put a hardship upon the lessee.

The argument made by those courts denying the apportionment of royalties is, that oil and gas while in or under a tract of land, are a part of it and belong to the owner, both before and after lease, and hence a sale of a part of the land carries ownership of such part to the purchaser, who thus becomes virtually the lessor, and as such must be entitled to all royalties accruing from his tract. Conceding the correctness of the proposition of ownership of those substances while in the land (a proposition distinctly denied by the Oklahoma Court, and not settled in West Virginia, Ohio or Indiana), the conclusion is a *non sequitur*. The same reasoning would lead to a denial of apportionment of rents in the agricultural lease, because the lessor there unquestionably owns the land after he has leased it, and the purchaser of a part of the land is the

owner of the reversion as to the part he purchases.

It is therefore submitted the doctrine is unsound, and it would be much more consonant with legal principles and avoid many complications and unjust results if the courts would hold royalties to be simply rentals, and apply all the law of landlord and tenant to the rights of the parties. If this were done, no additional burden would be put upon the lessee and no injustice done to successors in interest to part of the leased premises by lessee's acts of drilling on only some of the tracts, crowding the lines and drawing oil from other tracts through wells drilled on one.

D. EDWARD GREER.

Houston, Tex.

INSURANCE—INSURER DISCLOSING LIABILITY

ROLLINS V. BAY VIEW AUTO PARTS CO.
132 N. E. 177.

Supreme Judicial Court of Massachusetts.
Essex. Sept. 16, 1921.

Where an insurer against liability disclaimed liability and declined to defend an action against insured until after judgment had been rendered and vacated, it must take the litigation as it is, and has no right to attack the cept for causes which might have been open to action of the court in vacating the judgment, except if it had been heard originally on the petition to vacate.

RUGG, C. J. This is an action of tort to recover compensation for personal injuries alleged to have been sustained by the plaintiff through the negligence of an agent of the defendant acting within the scope of his agency. The Standard Accident Insurance company issued a policy of insurance which, it was contended by the defendant, protected it against loss resulting from such an action as that brought by the plaintiff. The defendant undertook to conform to the conditions of that policy in order to fix liability on the insurance company for whatever loss might accrue to it growing out of the present action. The insurance company disclaimed liability under the policy and declined to defend, al-

though notice of pendency was given to it seasonably. The declaration originally contained two counts; the first for personal injuries suffered by the plaintiff, the second for consequential damages flowing from injuries sustained by the plaintiff's wife from the same act of negligence. The action came on for trial. After default of the defendant, a general verdict was returned on both counts in favor of the plaintiff. On February 4, 1918, judgment was entered on the verdict. Execution issued. On April 12, 1918, the plaintiff brought a suit in equity against the insurance company under St. 1914, c. 464 (now G. L. c. 175, §§ 112, 113), seeking to satisfy his judgment against the defendant out of the obligation created by the policy issued by the insurance company to the defendant. A demurrer to the bill in that suit was sustained, apparently because the judgment in the plaintiff's action against the defendant, having been founded on a general verdict rendered on both counts without separation between the two did not afford sound basis for the suit against the insurance company. *Williams v. Nelson*, 228 Mass. 191, 196, 117 N. E. 189, Ann. Cas. 1918D, 535. The plaintiff thereafter on June 15, 1918, filed a petition in the present action, the execution having been returned into court without satisfaction, that the judgment entered in the preceding February be vacated on the ground that his rights had been prejudiced by the return of a general single verdict on the two counts and that this harm might be remedied by a new trial. Notice was issued on this petition and service was accepted by the attorney for the defendant. The plaintiff filed bond approved by the court as required by R. L. c. 193, § 17. The petition to vacate judgment was allowed on June 18, 1918, by a judge of the superior court other than the one before whom the verdict had been rendered. No notice of this petition was served upon the insurance company. On October 2, 1918, attorneys for the insurance company filed a "special appearance for the defendant" in the present case and filed a motion to set aside the order allowing the petition to vacate the judgment. This motion was denied. The plaintiff filed a motion that the special appearance for the defendant by the attorneys for the insurance company be vacated. This motion was allowed. These several motions were heard at the time when the case was heard on its merits before a judge without a jury. The plaintiff waived his second count and all claims except for bodily injury, pain and suffering to himself alone. The attorneys for the insurance company contested

the plaintiff's contentions at this trial. They took numerous exceptions in the name of the defendant. The case is here upon their bill of exceptions.

The conduct of the insurance company had not been such with respect to the plaintiff as to estop it from exercising the power to enter upon the defense of the action he had brought against the defendant at any time it saw fit. Whatever may be the effect of the conduct of the insurance company as between itself and the assured, there is no estoppel in its relations to the plaintiff. The insurance company owed him no duty to defend his action against the defendant. Its failure to do so at the first affords him no ground for objecting to a later assertion of its rights. It was said in *Boston & Albany Railroad v. Reardon*, 226 Mass. 236, at page 291, 115 N. E. 408, at page 411:

"In order to work an estoppel, it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow. But the doctrine of estoppel is not applied except when to refuse it would be inequitable. 'The law does not regard estoppels with favor, nor extend them beyond the requirements of the transactions in which they originate.'"

The record disclosed no facts of this nature.

If it be assumed that the plaintiff might take advantage of estoppel as between the insurance company and the defendant, the same result follows. No facts in the conduct of the insurance company estop it as between itself and its assured from assuming defense of actions brought against the latter, for the results of which the insurer might be liable under the policy. The defendant as assured has not in this particular been misled to its harm, either by the disclaimer of liability under the policy or the attempted cancellation of the policy. The effect of such conduct upon the rights of the insurer and the assured is not here involved further than to say that there is nothing in it which prevents the insurer from defending at any proper stage and at its own expense actions brought against the assured for which it may possibly be liable under the terms of the policy.

The earlier disclaimer by the insurance company of liability under the policy is not an estoppel against changing its position in this regard and undertaking the defense of the action. From the viewpoint of the defendant that course of conduct is the recognition by the insurance company of its error in assuming the first position. The tardy performance of its duty by the insurer has not misled the defendant to its harm. The case upon this

point is governed by the principle discussed in *Jennings v. Wall*, 217 Mass. 278, 281, 104 N. E. 136, and *Commonwealth v. Retkovitz*, 222 Mass. 240, 242, 243, 110 N. E. 293, where it was held that a party might change his position during the progress of litigation and that a contention once asserted might be abandoned for another inconsistent with the first, provided no inequity is done to the other side. *Corbett v. Boston & Maine Railroad*, 219 Mass. 351, 359, 107 N. E. 60, 12 A. L. R. 683.

The circumstance that the case had gone to judgment did not prevent the insurance company from asserting in behalf of the defendant what rights then remained to it. It must, however, take the litigation as it is, when the right to defend is asserted. The insurer acting under such power to defend as was conferred by the policy of insurance could not claim any greater recognition because of its delay in undertaking the defense, than if it had come into the case at an earlier stage. The insurer having waited until after the judgment had been vacated before it came in to defend had no right to attack that action of the court except for causes, if any, which might have been open to it, if it had been heard originally upon the petition to vacate the judgment. To this extent the doctrine of estoppel applies. To hold otherwise would put the plaintiff to a disadvantage.

There was no obligation on the part of the plaintiff to notify the insurance company of its petition to vacate the judgment. The plaintiff had no relation to the insurer. He could not move against it at all except under St. 1914 c. 464. That course could only be pursued after he had obtained judgment against the defendant; then, and not until then, under the conditions named in the statute, he could secure for his own benefit the contract of indemnity made by the insurer with the defendant. The fact that the plaintiff had commenced a proceeding under that statute imposed upon him no obligation to notify the insurance company of further proceedings in the action at law against the defendant.

The insurance company, by disclaiming liability under the policy and declining to undertake the defense of the action, waived its rights to notice which it would have received through its attorneys if it had availed itself of its privileges under the policy of insurance. It cannot at one and the same moment assert its right and flout its obligation out of which that right springs.

There is upon the record no error of law which affects the substantial rights of the parties or which vitiates in any particular the result reached in the superior court.

Exceptions overruled.

NOTE—Effect of Liability Insurer Repudiating Liability Under Its Policy.—An indemnity company, having repudiated its obligation to defend an action brought against the insured, will not be heard to say that, before it is liable for attorney's fees, incurred by the insured in defense of such action, its consent in writing to incur the fee must first have been had, as required by the terms of the policy, because "the company cannot refuse to perform its part and demand anything of the assured." *Royal Indemnity Co. v. Schwartz*, Tex. Civ. App., 172 S. W. 581.

In a New York case it was judicially declared that a condition in a policy forbidding a settlement without the written consent of the company, "should be limited to cases in which the company performs its contract obligations with respect to defending an action." *Mayor, L. & Co. v. Commercial Cas. Ins. Co.*, 169 App. Div. 772, 155 N. Y. Supp. 75.

The refusal of the insurer to defend an action brought against the insured has the effect of releasing the insured from the agreement not to settle the claim without the insurer's consent, and is a waiver of the condition that it is only liable for judgment rendered after trial and satisfied. *St. Louis Dressed B. & P. Co. v. Maryland Cas. Co.*, 201 U. S. 173, 26 Sup. Ct. 400, 50 L. ed. 712; *Butler Bros. v. American Fidelity Co.*, 120 Minn. 157, 139 N. W. 355, 44 L. R. A. (N. S.) 609.

Where the insurer was notified of an action brought against the insured, but denied liability and refused to defend the same, it was not necessary to notify it of a second action brought for the same cause after the voluntary dismissal of the first action. *Butler Bros. v. American Fidelity Co.*, 120 Minn. 157, 139 N. W. 355, 44 L. R. A. (N. S.) 609.

In a case brought by the insured against the insurer growing out of the refusal of the latter to defend an action, under its policy, brought against the former, it was held that the liability of the insured to the person injured and the extent of such liability could be litigated in the first instance in the present action; the insured having settled the claim of the injured person out of court. *St. Louis Dressed B. & P. Co. v. Maryland Cas. Co.*, 201 U. S. 173, 26 Sup. Ct. 400, 50 L. ed. 712.

A provision limiting liability to sums paid "in satisfaction of a judgment after trial of the issue" was held to be waived where the insured made a settlement in good faith with the injured person, after notifying the insurer of the proposed settlement and the insurer refused any advice or to take part in the case. *Bradley v. Standard Life & Acc. Ins. Co.*, 46 Misc. 41, 93 N. Y. Supp. 245.

Further, on this subject, see *Berry, Automobiles* (3rd ed.), § 1628.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS—WHEN AND WHERE TO BE HELD.

Florida—Orlando, June 15 and 16, 1922.
 Iowa—Sioux City, June 22 and 23, 1922.
 Kansas—Hutchinson, Nov. 21 and 22, 1921.
 Missouri—Kansas City, Nov. 30, Dec. 1 and 2, 1921.
 Nebraska—Omaha, Dec. 29 and 30, 1921.
 Oregon—Portland, Nov. 15 and 16, 1921.
 Rhode Island—Providence, Dec. 15, 1921.

CORRESPONDENCE.

MEETING OF THE KANSAS BAR ASSOCIATION.

Editor, Central Law Journal:

I am a subscriber of the *Central Law Journal* and also Vice-President of the Kansas State Bar Association. On page 285 of the *Journal* of October 21st you state that the meeting of the Kansas Bar Association will be held at Topeka on November 21st and 22nd, 1921. You have the dates right, but the place of meeting is Hutchinson, Kansas, instead of Topeka. Please make this correction.

Hon. C. A. Severance, President of the American Bar Association, will deliver the annual address at Hutchinson on November 21st. We will appreciate the favor if you will make the correction as to the place of meeting and also state that Mr. Severance will deliver the annual address.

Very truly yours,

CHESTER I. LONG.

Wichita, Kan.

HUMOR OF THE LAW.

A subscriber has recently sent to this LAW JOURNAL some specimens from (we think) the English "John Bull," the name of the publication, however, not being stated. They are each entitled "Anticipated Epitaphs," being designed to show off the frailties rather than the virtues of some of the best known men of Great Britain. Each "epitaph" would take up nearly two pages of the JOURNAL, but a single part specimen will indicate the kind of humor employed. We take that applying to Lord Haldane, which begins:

"Thys Granit Masse
 Keepees downe wyth difficultie
 Ye inflated remaynes
 Of

YE LORDE HALDANE,
 Fyrst Viscounte of Cloan.

Hee fyrst saw ye light in ye month of July,
 Anno Domini 1856,
 Butte continued more or lesse in ye darke
 Toe ye end of hys dales.
 Hee acqyred a smatterynge of educatione at
 Edinburg Academy;
 Improved upon itte atte
 Edinburg Universitie;
 And putte ye liddle onne itte atte
 Göttingen,

One of ye Hunne Universities.
 Itte is believed thatte hee there drankee German
 beere,

And thereby acqyred
 Ye Teutonick tastes and sympathies
 For ye whyche hee became notorious
 In later yeares.

Anno Domini 1885
 Hee was badlie bitten bye ye Partie bugge
 And became Liberal Member of Parlymente for
 Haddingtonshire—

A Scottyshe constituencie thatte atte ye tyme
 Suffered from an impediment in its intelligence.

Inne ye House of Commons
 Hee developed a gifte of ye gabbe
 Of suche horse-power
 Thatte hee myghte welle have beene chrystened
 Ye non-stoppe talker

Thys vyce
 Probable hadde itts origine
 Inne hys experience atte ye Barre
 (Legal—notte convivyal.)

The ending is as follows:

"Hee tryed toe make oute ye Kaiser toe bee
 A Manne of Peace,

And ye Hunnes a people from whom oozed
 Ye mylk of human kyndness.

Thenne, butte toe late,
 Hee woke uppe,
 And tryed toe recover ye confidence of
 Hys fellow-countrimenne,
 Ye whyche hee hadde loste.

Hee tryed,
 Butte hee fayled;
 And toe console hymselfe
 Myxed hymselfe uppe wyth Einstein,
 Ye Hunne Philosopher,
 And hys tosh aboute Relativitie.
 Thys beynge a little toe much foh hys brayne
 Hee dyed.

Here Haldane lyes, and everyone
 Thynkes itte ye beste thyng hee has done."
 —New Jersey Law Journal.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

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1. **Army and Navy—Injury in Line of Duty.**—The War Risk Insurance Act as amended provides the exclusive compensation for soldiers and sailors injured while in the line of duty, notwithstanding § 313, relating to recovery against others or injuries incurred in line of duty so that a sailor injured by the negligence of an employee of the Director General while he was on his way to join his ship cannot maintain an action against the Director General under Civ. Code, art 2315.—*Seidel v. Director General of Railroads, La., 89 So. 308.*

2. **Auctions and Auctioneers—Caveat Emptor.**—The principle of caveat emptor does not apply to an auction sale of land. *Needle v. Cover, Md., 114 Atl. 698.*

3. **Banks and Banking.**—**Drafts.**—The seller of certain cars of potatoes drew sight drafts on the purchaser in favor of the plaintiff bank, and attached them to the bills of lading with instructions to deliver on payment of drafts only. The plaintiff bank sent the bills with drafts attached to the defendant bank, which bank delivered the bills of lading without collecting the drafts. In a suit for damages against such bank for failure to follow instructions, held, that actual damages only can be recovered—in this case nothing, as the plaintiff received all the potatoes brought and were actually worth. *Northwestern Nat. Bank v. Peoples State Bank, Kan., 200 Pac. 278.*

4. **Special Deposit.**—To establish the theory of a special deposit, on which plaintiff's claim for preference against defendant insolvent bank was predicated, it was necessary for plaintiff to show that the money which he paid into the bank for purchase of a draft on a Greek bank at least came into the hands of the receiver of defendant insolvent bank in a substituted form, and that it swelled the assets of the bank. *Spiroplos v. Scandinavian American Bank, Wash., 199 Pac. 997.*

5. **Bills and Notes.**—**Payment for Stock.**—In a suit by the indorsee of promissory notes given to a corporation in payment for shares of its capital stock for which the maker of the notes subscribed in writing, when the stock has been issued and delivered by the corporation in accordance with the subscription contract, the maker of the notes is estopped to deny their ownership by the corporation. *Union Nat. Bank v. Moomaw, Neb., 184 N. W. 51.*

6. **Building and Loan Associations.**—**Liability of Members.**—It was competent for an unincorporated building and loan association organized under Laws 1919, p. 225, to limit the liability of its members without complying with provisions of §§ 9237-9249, relating to limited partnerships. *State v. Lee, Mo., 233 S. W. 20.*

7. **Carriers of Goods.**—**Delay.**—The plaintiff was bitten by a dog suspected of having hydrophobia. The plaintiff's physician shipped the dog's head to Manhattan for the purpose of

ascertaining whether or not the dog had hydrophobia at the time it bit the plaintiff. The box containing the shipment was marked, "Dog's head, Rush." The defendant was informed of the accident to the plaintiff and of the purpose for which the head was being shipped to Manhattan. The head was not delivered. Held, that the defendant is liable for the expense of the shipment, the mental pain caused the plaintiff, the expense incurred for medical treatment to prevent hydrophobia, the pain caused by that treatment, and the damage sustained by loss of time while taking it, although the treatment proved to be unnecessary. *Austin v. American Ry. Express Co. Kan., 200 Pac. 293.*

8. **Discrimination.**—Neither estoppel, ignorance, nor mistake can defeat Interstate Commerce Act and State Railroad Supervision Act as to discrimination and preferences; demurrage charges collected in excess of published tariffs may be recovered by shipper. *Southern Ry. Co. in Mississippi v. Buckeye Cotton Oil Co., Miss., 89, So. 228.*

9. **Notice of Arrival.**—Under a bill of lading limiting liability of carrier to that of warehouseman for loss occurring 48 hours after notice of arrival, and also providing, in another clause, for storage of goods, which, within 48 hours after notice of arrival, are not removed by the party "entitled to receive" them, the notice of arrival is to be given to the party "entitled to receive" the goods, which means a party who has an interest in the goods distinct from that of another or forwarding carrier, a steamship company, accepting them for conveyance to their destination. *Baltimore & O. R. Co. v. Jones & Laughlin Steel Co. Md., 114 Atl. 730.*

10. **Carriers of Passengers—Alighting.**—Where a street car passenger had given notice of her intention to alight, and the car had stopped at a regular stopping place to permit her to do so, the conductor was bound to ascertain whether she had alighted before giving the signal for the car to start, so that an instruction which did not require a finding that the conductor knew she was attempting to alight as a prerequisite to recovery, was not erroneous, though such a finding would be necessary to sustain recovery if the passenger were attempting to alight at a place other than a regular stopping place. *McMahon v. Kansas City Rys. Co. Mo., 233 S. W. 64.*

11. **Alighting.**—In an action for injuries, wherein the petition alleged a street car started with a "sudden jerk" as plaintiff was alighting therefrom, an instruction in favor of plaintiff if the car was "suddenly started forward" with such force as to throw her to the street was not reversible error, though it did not use the word "jerk," the words used conveying practically the same idea, and the gist of the negligence averred being the premature starting of the car. *Lass v. Kansas City Rys. Co. Mo., 233 S. W. 70.*

12. **Injury Caused by Derailment.**—Affirmative and undisputed evidence that derailment of a train by which a passenger was injured was due to the breaking of a rail, caused by an internal transverse fissure not discoverable by inspection, that the track was inspected daily, and that the rail was made by a reputable manufacturer, held to exonerate the railroad company from liability for the injury. *Holland v. Director General of Railroads, U. S. C. C. A., 273 Fed. 928.*

13. **Negligence.**—A passenger on a railroad train is not required to remain in his seat at all times during the transit; and if, in the exercise of due prudence he stands or moves about in the car, and while so standing or moving is injured by unduly violent stops or movements of the car in its operation, he may recover reasonably compensatory damages. *Atlantic Coast Line R. Co. v. Hamlett, Fla., 89 So. 337.*

14. **Constitutional Law.**—**Due Process.**—Where street bounding sprinkling district created by ordinance enacted under Act No. 310 of 1914, § 4 (45), subd. (1), was not sprinkled, the assessment of land bounded in the rear by such street at the same rate as land not on the edge of the district held not to constitute the taking of private property without compensation and without due process of law. *City of Lafayette v. Tanner, La., 89 So. 314.*

15. —"Obligation of a Contract."—Tax Law, § 270, as amended in 1911, under which a transfer of stock from the trustees of a voting trust to the owners may be taxed, is not a violation of the obligation of a contract entered into prior to such amendment between the owners of stock and the trustees of a voting trust, who, on the retransfer of such stock to the owners, paid the stamp tax imposed by the amendment and were reimbursed by the corporation which had agreed to pay the legitimate expenses of the transaction; the "obligation of a contract" meaning the means which, at the time of its creation, the law affords for its enforcement, or the law binding the parties to perform their agreement, there being no law entering into the contract between the parties to the voting trust that the tax laws should remain as they were at that time, and the levying of the tax in no way interfering with the carrying out of the contract. *Chicago Great Western R. Co. v. State*, N. Y., 189 N. Y. S. 457.

16. —Police Power.—It was within the police power of the Legislature to enact Rev. St. 1911, art. 4742, prohibiting provisions in insurance policies for the payment of less than the amount of the benefit stated on the face of the policy, and that statute is therefore not contrary to Const. U. S. art. 1, § 10, or Amendment 5 and 14, nor to Const. Tex. art. 1, § 19, as impairing the obligation of contract and taking away from the parties their right to contract, or taking away privileges and immunities, or depriving of property without due process or denying equal protection of the laws. *First Texas State Ins. Co. v. Smalley*, Tex., 233 S. W. 314.

17. —Corporations.—Doing Business in State.—In view of the interstate commerce provisions of the federal Constitution, a foreign corporation does not do business within the state, so as to be required to comply with the state laws, by delivering within the state goods sold under a contract executed elsewhere and shipped under the state for delivery. *Wood & Selick v. American Grocery Co.*, N. J., 114 Atl. 756.

18. —Power of President.—In the absence of corporate authorization or ratification, a contract which divests the corporation of all its assets is beyond the power of the president to make. *Andrew Jorgens Co. v. Woodbury, Inc.*, U. S. D. C., 273 Fed. 952.

19. —Receivership.—That a foreign surety company was in the hands of a receiver in the state of its domicile does not, where it does not appear to have been dissolved, prevent action in a domestic court. *N. Y. Mun. Ry. Corp. v. Intercont. Const. Corp.*, N. Y., 189 N. Y. S. 621.

20. —Sale of Stock.—Purchasers of corporate stock, par value \$1. for only 10 cents, as fully paid up, if aware of the initial transaction whereby certain unproved oil lands were conveyed to the company for the stock, would be liable to the corporation for the difference between the value of the property conveyed to it for the stock and the amount of stock issued therefor pro rata. *Jose v. Utley*, Cal., 199 Pac. 1037.

21. —Covenants.—Building Restrictions.—Covenants restricting the purchasers of lots in a given area to the erection of one-family houses constitute a neighborhood or community scheme, the regulations of which a lot owner must observe. If he had notice thereof at the time he purchased his lot, or if he was put on his guard and reasonable inquiry would have led to such knowledge. *Shoyer v. Mermelstein*, N. J., 114 Atl. 788.

22. —Building Restrictions.—Restrictions in a deed against the erection on the land of any building other than a private dwelling house, the occupancy of such dwelling house by more than one family, or use for any other purpose than a private dwelling house, prohibited the erection of a duplex or double house, having one continuous roof with a solid party wall, without openings or means of communication between the two parts, each side being designed as a complete abode for one family. *Baker v. Lund*, Conn., 114 Atl. 673.

23. —Building Restrictions.—The erection on a lot of "an apartment house containing five or six separate and distinct apartments, for five or six separate and distinct tenants or families" is a breach of a covenant in a con-

veyance of the lot that it is to "be used for residential purposes only, and only one residence is to be erected on each lot." *Mayer v. Hale*, Fla., 89 So. 364.

24. —Use of Building.—Where the R. hotel was operated with the C. hotel, and on sale of the C. hotel the purchasers exacted a covenant in their deed that the R. hotel should not be used as a hotel for 15 years, such covenant was a condition of the conveyance of the C. hotel, and was intended for the benefit of such property, and the selling owner, after his repurchase of the C. hotel, could enforce it against the owners of the R. hotel, his remote grantors, the restriction being for the benefit of the C. hotel property and appurtenant to it, not being void as an illegal restraint of trade, the restraint being reasonable. *Huntley v. Stanchfield*, Wis., 183 N. W. 984.

25. —Deeds.—Delivery.—When grantor delivered to the scrivener deeds in which his children were grantees, held, that there was a valid delivery. *Watson v. Cox*, S. C., 108 S. E. 165.

26. —Divorce.—Condonation.—Condonation of adultery is always conditional that the pardoned party shall in the future treat the other with conjugal kindness, and shall not only refrain from a repetition of the offense forgiven, but shall also refrain from committing any other offense which falls within the cognizance of a matrimonial court. *Bravo v. Bravo*, N. J., 114 Atl. 790.

27. —Equity.—Jurisdiction.—Where equity has acquired jurisdiction to grant relief in a class of cases because there is no adequate remedy at law, the enlargement of a legal remedy, so as to afford adequate relief, does not deprive equity of its existing jurisdiction. *Kellogg v. Schaubele*, U. S. D. C., 273 Fed. 1012.

28. —Right of Action.—Where one bondholder of a corporation filed a petition in a foreclosure suit for the benefit of himself and all others similarly situated who would come in and share the costs of the proceeding, asserting a claim against another corporation for diversion of assets of the mortgagor, a delay of 10 years by other bondholders similarly situated before coming in, during which time the claim was being actively litigated by the petitioner, held not laches, which barred their rights against the adverse party, the petitioner making no objection. *Bankers' Trust Co. v. Virginia Ry. & Power Co.*, U. S. C. C. A., 273 Fed. 999.

29. —Estoppel.—Alienation of Affections.—A decree for divorce, granted to a wife in her suit therefor, not contested by the husband and in which she alleged false charges by him of infidelity on her part, did not bar a subsequent suit by him against another for the previous alienation of her affections, on the theory that the matters involved were determined by her suit. *Pollard v. Ward*, Mo., 233 S. W. 14.

30. —Executors and Administrators.—Sale of Homestead.—Rev. St. 1909, § 6708, to provide that when the heirs of the husband are persons other than his children the homestead may be sold for the payment of debts of his estate subject to the rights of the widow, applies only when all of his heirs are persons other than his children, and not when his heirs are his children and a grandchild. *Dennis v. Gorman*, Mo., 233 S. W. 50.

31. —Frauds, Statute of.—Oral Agreement.—Bill for specific performance of an oral contract to execute a written contract for the sale of lands will be dismissed for want of equity. *Schwartz v. Hoerster*, N. J., 114 Atl. 785.

32. —Garnishment.—Municipal Corporation.—A debt due by a municipal corporation in the conduct of a private and proprietary enterprise, such as a municipal water system, may not be garnished in an action against the creditor, under Code Civ. Proc. § 710, and § 710a, as added by St. 1919 c. 276. *Trillary v. City of San Diego*, Cal., 199 Pac. 1041.

33. —Gas.—Cost of Reproduction.—In valuing the property of a gas company for rate purposes, the cost of cutting and replacing pavement over mains held properly excluded in estimating the cost of production. *Pacific G. & E. Co. v. City and County of San Francisco*, U. S. D. C., 273 Fed. 937.

34. —Guaranty.—"Against Loss."—A guaranty "against loss" is a guaranty of collection, and before resort can be had to the guarantor on

such a guaranty, the creditor must exhaust his remedy against the principal. *Wyman, Partidge & Co. v. Bible*, Minn., 184 N. W. 45.

35.—**Impairment of Obligation.**—Where each installment of rent is a separate and independent demand, the extension of the time of payment of one will not impair the obligation of a guarantor as to the others. *Sutter v. Nenninger*, N. Y., 189 N. Y. S. 662.

36.—**Injunction—Award of Attorney's Fee.**—Defendants, on dissolution of temporary restraining order, were not entitled as damages, under plaintiff's bond, to fees of all three attorneys employed to procure dissolution, since any one of the three could have attended to the matter, and since plaintiff under such bond was liable for fee to only such counsel as was proper or necessary. *Britt v. McCormick County Commission*, S. C., 108 S. E. 179.

37.—**Growing Crop.**—One who has been prevented from making crops by an injunction cannot recover as damages from person who procured injunction the profits he might have realized, since such profits depend upon whether the crop would be made, and if made it would be made at a profit, and are clearly too uncertain to serve as a basis for judgment. *Boudreaux v. Thibodeaux*, La., 89 So. 250.

38.—**Strikes.**—Where violence, threats, or intimidation are used in an effort to induce another to quit his employment, then the acts of an individual or a number of individuals are unlawful, and may be enjoined and it is not necessary to the enjoining of such acts that it be shown there was actual force or expressed threats of physical violence used. *Southern Cal. I. & S. Co. v. Amalgamated Ass'n I. S. & T. W. Cal.*, 200 Pac. 1.

39.—**Insurance.**—Assessment Contract. — Though insurer was a foreign fraternal order authorized to do business within the state, certificates issued by it, whereby it agreed to pay only the amount realized from one assessment on its members holding certificates of that class, were contracts of insurance on the assessment plan within Rev. St. 1919, § 6155, requiring such certificates to specify the exact amount which the insurer thereby promises to pay, so that insurer is liable for the face of the certificates, though it exceeded the amount realized from one assessment. *Kribs v. United Order of Foresters*, Mo., 233 S. W. 89.

40.—**Default on Note.**—Where the policy provides for such a forfeiture, and the insured executes and delivers to the company a note to cover a renewal premium, which note recites that, if not paid at maturity, the insurance policy shall become null and void without act on the part of the company, and the company issues a receipt for the note, reciting that the policy shall continue in force until the maturity of the note, it is quite clear that the note was not given as an unconditional payment of the renewal premium, but as an extension of time for the payment of the premium, and a default in the payment of the note will work a forfeiture of the policy. *Novak v. La Fayette Life Ins. Co. Neb.*, 184 N. W. 64.

41.—**Proof of Loss.**—A provision in a fire insurance policy whereby the insured is required, in the event of loss, to furnish written proof thereof, signed and sworn to by him, within 60 days after the fire, is for the insurance company's benefit, and is waived by it by a course of conduct on its part, during such period of time, which reasonably induces the insured to believe that settlement will be made without such proof, if the insured, acting on such belief, fails to comply with said provision. *Brown v. Firemen's Ins. Co. Neb.*, 184 N. W. 88.

42.—**Intoxicating Liquors—Penal Ordinance Not Void.**—A penal ordinance of the city of Stockton, denouncing the offense of selling intoxicating liquors containing more than one-half of 1 per cent alcohol by volume, is not void as a violation of Fed. Const. Amend. 18. *Ex Parte Volpi*, Cal., 199 Pac. 1090.

43.—**Use of Automobile.**—One whose car was borrowed for the ostensible purpose of hauling food, in view of the fact that the borrower when borrowing it on previous occasions for such purpose had used it therefor, was not put on notice that the borrower might use it for illegal transportation of liquor, so as to allow of its condemnation on his so using it, though she knew of his having previously

so used his own car. *One Liberty Roadster v. State, Ala.*, 89 So. 273.

44.—**Libel and Slander.**—Privileged Communication.—An indictment in the Supreme Court of the District of Columbia for libel, contrary to Code D. C. §§ 815-818, providing the punishment therefor, but not defining libel, so that common-law libel is intended under Code, § 1, which indictment alleged that the libelous words were not only false, scandalous, malicious, and defamatory, but were uttered with the unlawful and malicious intention to vilify, defame, scandalize, and disgrace the subject of the publication, shows that the alleged libel was not privileged as the performance of the legal duty required by Criminal Code, § 146 to declare to a public official knowledge of the commission of an offense, though the alleged libel was a communication to the district attorney that an attorney had procured defendant's indictment by perjured evidence. *Ormsby v. United States*, U. S. C. C. A., 273 Fed. 977.

45.—**Limitation of Actions.**—Statute Construed.—Where a suit to recover damages for the homicide of an employee of a railway company is brought under the federal Employers' Liability Act, by the administratrix of the deceased employee, the action is barred by the statute of limitations where it was commenced more than two years after the date of the homicide sued for, but within two years from the date of the appointment of the administratrix. *Seaboard Air Line Ry. v. Brooks*, Ga., 108 S. E. 166.

46.—**Master and Servant.**—Arising Out of Employment.—If the incapacity of a truck driver with heart disease to drive a truck was caused by a heart attack, brought on by exertion, sudden shock, or excitement incident to his employment on the highway, compensation may be recovered for his death by being run over after falling off. *George L. Eastman Co. v. Industrial Acc. Commission*, Cal., 200 Pac. 17.

47.—**"Employee."**—Superintendent of bridges of the city of Bridgeport appointed by the director of public works under Charter of the City of Bridgeport, § 114, making director of public works responsible for maintaining streets and bridges in good repair and authorizing him to appoint assistants necessary for the performance of such duty, who performed his duties under the instructions of the director of public works was responsible alone to such director, and could make no repairs or purchase material except upon order and approval by the director, but whose compensation was fixed by the common council without the city charter creating, or authorizing the council to create, such an office, held an "employee" of the city within the Workmen's Compensation Act, and not a "public officer." *Burrell v. City of Bridgeport*, Conn., 144 Atl. 679.

48.—**Hazardous Employment.**—Under Workmen's Compensation Law, § 2, group 13, making the excavation of graves a hazardous employment, and § 3, subd. 5, making the act applicable only to employment, in a business carried on for pecuniary gain, a religious society, conducting a cemetery, the lots in which it sold for profit, is subject to the Compensation Law, though the profits it derived thereby were applied by it to charitable purposes, so that in an action for injuries to an employee of such society, which had not complied with the insurance provisions, it was proper to withdraw the defenses of contributory negligence and assumption of risk from the jury, under § 11. *Dillon v. Trustees of St. Patrick's Cathedral*, N. Y., 189 N. Y. S. 594.

49.—**Traveling Salesman.**—Where a traveling salesman, obliged to stop at hotels in the course of his travel and to furnish his employer with a list of the cities on his itinerary, the names of the hotels at which he is to stop and the time he is to be at each hotel, is killed while attempting to escape during a fire in one of such hotels in which he is stopping, compensation may be recovered. *Stansberry v. Monitor Stove Co.*, Minn., 183 N. W. 977.

50.—**Water Supply Policeman** not "Employee."—As the idea of an "officer" embraces the idea of tenure, duration, fees or emoluments, and rights and powers, as well as that of duty embracing the idea of the right to exercise the official function, one appointed a water supply policeman under Laws 1905, c

724, § 35, as amended by Laws 1906, c. 314, § 6, declaring that it shall be the duty of the board of water supply of the city of New York to provide police protection for the inhabitants of the localities in which work in developing supply may be done, one appointed a water supply policeman is not an "employee" within the Workmen's Compensation Law, and, though such policeman suffered an accident while riding a motorcycle, and later died of influenza pneumonia, there can be no award in favor of his dependent, under § 2, group 41; the mere fact that he incidentally rode a motorcycle not changing his status. *Kahl v. City of New York*, N. Y., 189 N. Y. S. 547.

51. **Monopolies—"Commodities."**—Plaintiff owned stock in an oil well company which he desired to sell at 75 cents per share. Defendant promoters were selling stock in the company at \$1 per share, and agreed with plaintiff that if he would not sell his stock for 60 days, so as to maintain the price at \$1 per share, they would guarantee him 90 cents a share for it. Held, the guaranty agreement was unenforceable by plaintiff, being a violation of the Anti-Trust Act, prohibiting, among other things, a combination to fix the price of any commodity, as shares of stock are within the meaning of the term "commodities," which is a broader term than merchandise, and which, in referring to commerce, may mean almost any article of movable or personal property. *Pound v. Lawrence*, Tex., 233 S. W. 359.

52. **Mortgages—Foreclosure.**—Where complainant, the purchaser, at foreclosure of the first mortgage against the land gave a mortgage to secure the purchase money, which was subsequently foreclosed by sale, and the assignee of a second mortgage in effect redeemed from the sale under the first mortgage by procuring a conveyance from the purchaser at the foreclosure of complainant's mortgage, complainant cannot redeem from such assignee on the theory that he was redeeming from the foreclosure of the mortgage given by him. *Hamilton v. Cody*, Ala., 89 So. 240.

53.—**Right of Second Mortgage.**—Where a third mortgagee redeemed from the foreclosure, under Code 1907, § 5746 et seq., a second mortgagee could not redeem, nor hold the third mortgagee as trustee for the benefit of himself and the second mortgagee, in the absence of special equities. *Allison v. Cody*, Ala., 89 So. 238.

54. **Principal and Surety—Destruction of Building.**—Where contractors employed to remodel a building were to get the building as it stood, and own all of the building except what was used in the new work, and receive a specified amount for their undertaking, and were to be answerable for and restore and make good all damages, etc., occasioned or rendered necessary by fire, etc., the contractors and their surety were not discharged by the destruction of the building by fire before completion of the work, and by the owner's failure to restore it to the condition it was in when the contractors began to remodel it. *Crymes v. Gaul Const. Co.*, S. C., 108 S. E. 175.

55. **Railroads—Death by Wrongful Act.**—Where plaintiff's decedent was killed by a train of cars pushed by a locomotive, and there was evidence tending to show that he had been run over while lying on the track in a drunken stupor, there could be no recovery for wrongful death, notwithstanding the train was operated with only an ordinary railroad lantern on the first car. *Bridges v. Kinder & N. W. R. R.*, La., 89 So. 309.

56. —**Interest of Director General.**—The Director General of Railroads, during his administration, held to have a legal interest in an existing contract for the supplying of fuel oil to a railroad company, which entitled him to maintain an action to recover damages from one alleged to have maliciously interfered with such contract by causing the seller to refuse performance. *Gulf, C. & S. F. Ry. Co. v. Cities Service Co.*, U. S. D. C., 273 Fed. 946.

57.—**Pedestrian's Contributory Negligence.**—In an action against a railroad company for the death of a pedestrian at a crossing, where the evidence was conflicting as to whether de-

ceased view was unobstructed, and as to how light it was at the time, and the jury visited the scene at a time in the evening when the amount of light was about the same as at the time of the accident, and observed the placing, and movement of trains, it was for the jury to determine whether the physical facts demonstrated a situation compelling the conclusion of deceased's contributory negligence through failure to look and listen for the approaching car. *Green v. Southern Pac. Co.*, Cal., 199 Pac. 1059.

58. **Specific Performance**—**Forfeiture for Nonpayment.**—Equity is powerless to come to the relief of a purchaser who has failed to pay at the time specified in the contract when the contract distinctly and clearly provides that time is essential, and that purchaser's rights as purchaser shall cease and become void unless payment is made at the time stipulated. *Dortman v. Schroeder*, N. J., 114 Atl. 810.

59.—**Refusal of Wife to Join in Conveyance.**—That the wife of the vendor refused to join in a conveyance is no ground for denying specific performance of an option given to purchase land, and the purchaser may enforce his rights against the husband, with abatement on account of the wife's inchoate rights of dower. *Lewis v. Ludlam*, N. Y., 189 N. Y. S. 636.

60. **Taxation—Public Utility.**—In assessment of franchise of public utility corporations occupying city streets, the board of state affairs is not justified in adding to the earning value of the franchise an additional assessment for the privilege of occupying the streets or for carrying on the business of the corporation, since the value of the franchise is to be determined by earning capacity. *Baton Rouge Electric Co. v. Board of State Affairs*, La., 89 So. 244.

61.—**Valuation.**—A taxpayer may not complain of a valuation which could ordinarily be obtained for his property at private sale unless there is such a general undervaluation as will result in an excessive tax to him, and such assessment cannot be impeached by comparison with less than 2 per cent of the property in the district where it does not appear that improper considerations influenced the valuation of his property. *Walters v. Jung*, Wis., 183 N. W. 986.

62. **Telegraphs and Telephones—Delay.**—A telegraph company is not liable for substantial damages for delay in the delivery of a telegram offering to loan plaintiff money with which to purchase cattle for pasturing, where the evidence showed that the cattle in question were not sold to another until long after the telegram was delivered, and did not show that plaintiff could not have purchased them upon receipt of the message. *Cornell v. Western Union Telegraph Co.*, Cal., 199 Pac. 1087.

63.—**Limitation of Liability Not Binding.**—Where neither the sender nor the addressee of a cable message which a telegraph company has failed to transmit is shown to have entered into a stipulation with the original carrier, or with the company itself, limiting liability, or to have had any notice thereof, they are not bound, although the blank on which the message was written contains stipulations of that nature. *Freschen v. Western Union Telegraph Co.*, N. Y., 189 N. Y. S. 649.

64. **Vendor and Purchaser—Assignment.**—Where the purchaser assigned his memorandum of sale to plaintiffs, with the contract referred to in it, merely agreeing to and merely transferring to them whatever rights he had in the contract, plaintiffs are not entitled to recover from him their payment to him, though the vendor refused to carry out the agreement of sale. *Kleinman v. Strassburg*, N. Y., 189 N. Y. S. 633.

65. **Waters and Water Courses—Right to Erect Levees.**—A riparian proprietor of drainage district is entitled to erect levees or such other works as will protect its lands from the accidental or extraordinary flood waters of a stream. No other riparian owner can complain of this action because of injury thereby inflicted upon him. *Jones v. George*, Miss., 89 So. 231.

Central Law Journal.

St. Louis, Mo., November 18, 1921.

THE ARBITRATION OF RAILROAD LABOR DISPUTES.

The successful handling of the problems arising out of the recent controversy between the railroads and their employees on the part of the Railroad Labor Board calls attention to the importance of this new experiment in the quasi-judicial determination of labor disputes.

This Board was created by Act of February 28, 1920, c. 91, Title III. Section 304 of this Act (Barnes Fed. Code, 1921 Supp., Sec. 8088e) provides as follows:

"There is hereby established a Board, to be known as the Railroad Labor Board, and to be comprised of nine members, as follows: First, three members constituting the labor group, representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice of the Senate, from not less than six nominees, whose nominations shall be made and offered by such employees in such manner as the Commission shall by regulation prescribe; second, three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees, whose nominations shall be made and offered by the carriers in such manner as the Commission shall by regulation prescribe; and third, three members constituting the public group, representing the public, to be appointed directly by the President, by and with the consent of the Senate."

The members of this tribunal are not necessarily lawyers. They are appointed for terms of five years, and receive \$10,000 per annum for their services. The function of this Board is to compel the arbitration of industrial disputes where the parties to the controversy do not voluntarily submit their case to a tribunal constituted by the parties themselves and known as an Adjustment Board, as provided for by Act of July 15, 1913, Ch. 6, 38 Stat., § 103, entitled

Common Carriers and Employees. This Act of July 15, 1913, was not effective. There were no teeth in it. Either party to the controversy could defeat it by refusing to appoint arbitrators. The Act of Feb. 28, 1920, does not repeal the Voluntary Arbitration Act, but simply provides that if the Adjustment Boards therein provided for are not organized by the parties, or are unable to reach prompt decisions, the Labor Board may act: first, on the application of the chief executives of any carrier or labor union; second, on the written petition of not less than one hundred unorganized employees; or third, on the Board's own motion "if it is of the opinion that the dispute is likely substantially to interrupt commerce."

The Board has power to investigate the facts of a railroad dispute and render a decision on such facts adduced in evidence, determining the issues therein in favor of one party or the other. This is a part of its judicial functions. It also has the administrative function of establishing "rates of wages and salaries and standards of working conditions which in the opinion of the Board are just and reasonable." It also is required to make a thorough study of labor conditions on railroads and to compile, classify and publish the results of its investigations and researches.

The Board has power to summon witnesses and compel their attendance. It may order the production of any books or papers and no person is excused from producing such books or papers on the ground that such evidence would tend to incriminate him; it being provided that no natural person shall be prosecuted on account of any testimony so given.

The recent strike controversy between the railroads and their employees appears on the Board's docket as Decision 299, in the case of Big Five Railway Organization v. Ann Arbor R. R. Co.

This case was instituted by the Board on its own motion "in order to develop the causes and true facts and conditions to the

end that all possible measures might be taken to avert the disaster." This declaration shows the strength of this Board over any mere judicial tribunal. It has the power to compel parties to come into court. Neither the railway employees nor the employers had sought the Board's intervention. Nevertheless a case is docketed and the parties brought before the Board and an investigation into the causes of the strike initiated. "The subject and impelling cause of the inquiry," said the Board in its formal decision, "was the threatened general strike of the employees comprising the membership of the above-named labor organizations on practically all the first-class railroad lines in the United States, which, if it had culminated, would have resulted in a national calamity of incalculable magnitude."

Evidence of the cause of the strike was received, witnesses were examined and after a very careful sifting of the evidence, the Board found that the real cause of the strike was the dissatisfaction on the part of the employees with decision No. 147 of the Board, making a reduction in wages.

The importance of this finding is at once apparent. It not only made the cause of the strike public, but showed that it was not directed against the employers, but against the Board itself. The employees had put themselves in the position of attacking a department of the government itself and that was not an issue on which any group in this country, no matter how highly organized, could hope for success.

Since the decision of the Board (No. 299) and the calling off of the threatened strike, the prestige of the new tribunal has been greatly enhanced. After the strike had been abandoned the representatives of the employees and of the carriers announced publicly their intention and purpose to conform to the law and abide by the orders of the Board. The Board then issued the following opinion:

"While the matter is so intensely before the minds of all, the Board deems it expedient and proper to make its rulings and

position on some of the points involved so clear that no ground for any misunderstanding can hereafter exist.

"First, when any change of wages, contracts or rules previously in effect are contemplated or proposed by either party, conference must be had as directed by the Transportation Act and by rules of procedure promulgated by the Board, and where agreements are not reached, the dispute must be brought before this Board, and no action taken or change made until authorized by the Board.

"Second, the ordering or authorization of the strike by the organizations of employees, parties hereto, was a violation of Decision No. 147 of this Board, but said strike order having been withdrawn, it is not now necessary for the Board to take any further steps in the matter.

"The Board desires now to point out that such overt acts by either party tending to and threatening an interruption of the transportation lines, the peaceful and uninterrupted operation of which are so absolutely necessary to the peace, prosperity and safety of the entire people, are in themselves, even when they do not culminate in a stoppage of traffic, the cause of great anxiety and damage.

"The Board further points out for the consideration of employees interested that when such action does result in a strike, the organization so acting has forfeited its rights and the rights of its members in and to the provisions and benefits of all contracts thereto existing and the employees so striking have voluntarily removed themselves from the classes entitled to appeal to this Board for relief and protection."

Those interested in the development of tribunals for the compulsory determination of labor disputes will follow the working out of this new experiment by the Federal Government with much interest. We congratulate the Board and the Congress on the auspicious beginning of this new administrative tribunal. Its continued success and that of the Kansas Industrial Court will no doubt lead to the establishment of similar tribunals in other states and particularly with respect to industries where a strike works a great hardship on the people.

NOTES OF IMPORTANT DECISIONS.

IS A DEVISE VOID WHICH IS IDENTICAL WITH ESTATE BY DESCENT?—The Supreme Court of Illinois follows an old common law rule in refusing to probate a will which did nothing more than appoint an executor and then devise the property to the testator's legal heirs, on the ground that such a devise was void. *Lasier v. Wright*, (Decided Oct. 22, 1921) 54 Chl. Leg. News 106.

In this case one Haines, a bachelor, died, leaving two wills. The first will devised the property to his mother, his sole heir, and appointed an executor. The latter will left the same property (about \$400,000) to his mother for life, remainder to certain charities. The later will did not expressly revoke the former will, and for that reason certain collateral heirs of the testator's mother (since deceased) sought to probate the first will. In holding the first will void the Court said:

"It has long been the settled law of this State, based upon and following the rule of the common law, that a 'devise to the heir-at-law is void if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will. The title by descent has in that case precedence to the title by devise.' (4 Kent's Com.—14th ed.—*506; *Akers v. Clark*, 184 Ill. 136.) This rule of the common law is laid down by Blackstone (vol. 2, *242,) as follows: 'But if a man seized in fee devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it he shall be adjudged to take by descent,'—and the rule has been approved by this court for many years. (*Kellett v. Shepard*, 139 Ill. 433; *Akers v. Clark*, supra; *Biggerstaff v. Van Pelt*, 207 Ill. 611; *Darst v. Swearingen*, 224 id. 229; *Wiltfang v. Dirksen*, 295 id. 362; *Brinkerhoff v. Butler*, 296 id. 368.) Various reasons have been given for this rule of law, among others, that it is based on the principle that a man cannot give to another what he has already. (*Scott v. Scott*, 1 Eden's Ch. 458; *Counden v. Clarke*, Hob. 29; *Godolphin v. Abingdon*, 2 Atk. 57.) Again, it has been said that the rule has been adopted in favor of the heir that he might be in of his better title,—that is, the title by descent takes precedence over the title by devise. (*Ellis v. Page*, 7. Cush. 161.) But some of the authorities say that this cannot be the sound reason, for in that case the heir would be entitled to an election to take either under the will or by descent, as might be most to his advantage; but this he cannot do. (*Powell on Devises* 21 Law Lib. *421.) This author also says that 'the rule seems rather to be adopted in favor of third persons, viz., of the lord for the preservation of the tenure and of creditors for the preservation of their debts.'"

The Court also held that the mere appointment of executors was not such as to entitle the will to probate. On this point the Court said:

"We see no reason why the will of 1887, under the circumstances shown in this record, the entire devise being void and the executors not living, should be admitted to probate simply for the purpose of permitting the probate court to name an administrator with the will annexed. Such a proceeding would cause additional expense to the estate and result in no benefit to it."

LIABILITY OF COLLECTOR FOR TAXES UNLAWFULLY COLLECTED BY PREDECESSOR.—If a collector of federal taxes unlawfully and over due protest collects taxes can they be recovered from his successor? This was the question decided by the Supreme Court of the United States, Oct. 24, 1921, in its decision in the case of *Smietanka v. Indiana Steel Co.* (not yet reported.)

The case came before the Court by the certification on the part of the Circuit Court of Appeals of the following question:

"May suit in the District Court of the United States properly be brought and maintained against a United States collector of internal revenue for the recovery of the amount of a United States internal revenue tax, unlawfully assessed and collected, but in the collection and disbursement of which such collector had no agency, the entire transaction of such assessment, collection and disbursement having occurred during the incumbency of such office of a predecessor in office of such collector?"

Before the intervention of any statute the federal law has always been that a collector of taxes was liable to a taxpayer who declared at the time of payment that the tax was unlawful and gave notice to the collector of his intention to sue and warning him not to pay the amount of the tax so collected to the treasury. *Elliott v. Swartwout*, 10 Pet. 137. A later statute, however, required collectors to pay over tax monies so collected irrespective of any protest. The Court then held that this removed the personal liability of the collector. *Cary v. Curtis*, 3 How. 236. Later Acts recognize the liability of the collector and provide that the District Attorney defend him and that in certain cases, the amount of the judgment, if any, be paid out of the United States treasury. It was contended by the Steel Company that these statutes recognize suits against collectors and that the liability is attached to the office and not to the man. This, the Supreme Court holds, is not the case and that the liability of the collector is still personal. On this point the Court said:

"To show that the action still is personal, as laid down in *Sage v. United States*, 250 U. S. 33, 37, it would seem to be enough to observe that when the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the Court in the case. It is not to be supposed that a stranger to an unwarranted transaction is made answerable for it; yet that might be the result of the suit if it could be brought against a successor to the collectorship. A personal execution is denied only when the certificate is given. It is true that in this instance the certificate has been made, but the intended scope of the action must be judged by its possibilities under the statutes that deal with it. The language of the most material enactment, Rev. St., § 989, gives no countenance to the plaintiff's argument. It enacts that no execution shall issue against the collector but that the amount of the judgment shall 'be provided for and paid out of the proper appropriation from the Treasury,' when and only when the Court certifies to either of the facts certified here, and 'when a recovery is had in any suit on proceedings against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty.' A recovery for acts done by the defendant is the only one contemplated by the words 'by him.'"

FREE SPEECH AND LAWS IN DEROGATION THEREOF.

Grote¹ has emphasized the influence of public speaking on the ancient Greeks, as follows:

"That its development was greatest among the most enlightened sections of the Grecian name, and smallest among the most obtuse and stationary, is matter of notorious fact; nor is it less true, that the prevalence of this habit was one of the chief causes of the intellectual eminence of the nation generally * * * *. If the primary effect was to quicken the powers of expression, the secondary, but not less certain result, was to develop the habit of scientific thought."

And further:

"It was the blessing and the glory of Athens that every man could speak out his sentiments and his criticisms with a freedom unparalleled in the ancient world, and hardly paralleled in the modern, in which a vast body of dissent is

and always has been condemned to absolute silence."²

The qualifications of Grote to speak thus authoritatively on the effect of free speech on a people is derived from his broad study both of the ancient and modern world. For it is to be borne in mind that his *History of Greece* is a study not of Greece alone, but of the civilized world during the period of which he wrote, and that he lived in an age in which the freedom of speech had been but recently achieved after a long and arduous struggle. And the patent truth of his last remark has been too often demonstrated in our own country in the last few years to need extended elucidation. Espionage Acts, Criminal Syndicalism legislation and legislation against sedition have become so numerous and have been followed by such wholesale arrests, prosecutions, incarcerations and deportations that one has at times wondered where and when it would all end or whether or not one was free to utter an honest opinion in reference to one's country's weal or woe.

And all this repressive legislation has been enacted and enforced in the face of our Bill of Rights, embodying the long and generally recognized principle that in this country anyone has "the right to publish, with impunity, truth, with good motives, for justifiable ends though reflecting on government, magistracy, or individuals."³ Moreover, we have had the First Amendment to the Constitution of the United States as follows:

"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech or of the press*; or the right of the people peaceably to assemble and petition the Government for a redress of grievances."

What are good motives and justifiable ends in the definition before quoted are questions on which persons may differ

(2) 8 *Id.*, 348.

(3) Chafee, *Freedom of Speech*, 30, n.

(1) 2 *History of Greece*, 77.

and in reference to which there may be some confusion. The line of cleavage between what it is right to publish and what it is wrong to publish is not always clear. A man has no right to shout "fire" in a crowded theatre, to use a familiar illustration. Neither has he the right to publish that which might give an advantage to the public enemy. Such matters are fairly clear. But where we oftenest lose our bearings, if not our heads, is when government is criticized. If the times are excited and public sentiment runs high, it is then that the freedom of speech is endangered. In this connection the case of John Wilkes is in point. He had published in his "North Britain" newspaper an editorial assailing Lord Bute's administration, and after the downfall of that minister continued his attacks upon the government, even accusing the King of falsehood. The House of Commons declared the paper in question a seditious libel, ordered it burned and passed a special act for the author's prosecution. Prof. Chaffee⁴ quotes the following from Burke on this crucial case as having the greatest value for our own time:

"Accumulative crimes are unknown to the courts below. In those courts two bad things will not make one capital offense. This is a serving up like cooks. Some will eat of one dish, and some of another, so that there will not be a fragment left. One honorable member could not bear to see Christianity abused, because it was a part of the common law of England. This is substantial roast-beef reasoning. One gentleman said that he meant Mr. Wilkes' petition to be the ground of expulsion; another, the message from the House of Lords. 'I come into this resolution,' says a fourth, 'because of his censure of the conduct of a great magistrate.' 'In time of danger,' says a fifth, 'I am afraid of doing anything that will shake the government.' These charges are all brought together to form an accumulated offense, which may extend to the exclusion of every

other member of this House. This law, as it is now laid down, is that any member, who, at any time, has been guilty of writing a libel will never be free from punishment."

Sentiments like these stand as a warning against interference with freedom of speech except in cases of the greatest public exigency. Though Burke is speaking of the expulsion of Wilkes, the point he makes against the bringing together of different charges, so that all phases of opinion may be enlisted for conviction, can be charged with equal propriety against our espionage acts and laws to punish criminal syndicalism. These laws group together a vast and varied list of acts, any one of which one may not do or attempt to do without running afoul of the authorities. For example, one who even "attempts to justify by word of mouth or writing the commission or attempt to commit sabotage, any act of physical violence, the destruction or damage to property, the injury of any person or the commission of any crime, with intent to exemplify spread or teach, or affirmatively suggest criminal syndicalism," etc., shall be guilty of a felony and liable to one to ten years imprisonment or a fine of one thousand dollars, or both fine and imprisonment.⁵

If there is ever a wish at any time to let loose the agents of government against anyone of pronounced and outspoken opinion in opposition to constituted authority, so long as laws of this kind remain on the statute books, warrant is not wanting for doing it or means lacking for conviction. The language of the statute does not even permit one to gain salvation by repentance. If one attempt and afterwards repent of the attempt and goes no further with the undertaking, one is punishable anyway. Such language is calculated to induce one to put his attempt into execution at all hazards, because he may reason that

(4) Freedom of Speech, 314.

(5) Laws of Neb. for 1919, Ch. 261.

if he has got to die anyhow he may as well die in the full knowledge of having accomplished his purpose. Indeed, the statute is so worded that one could be punished for a remote tendency, an outward appearance or an apparent leaning toward the crimes invented. And when we consider that laws of this character are apt to be enforced in times of public turbulence and excitement, it may be readily inferred that there will be, under such circumstances, many unjustifiable convictions, and abuses of authority verging upon if not having all the attributes of persecution. At such times spies are everywhere and the informer and procurer bloom and flower with tropical luxuriance. Men are hunted and hounded and haled before boards and commissions and into courts charged with crimes on the most flimsy evidence, on suspicion, for the expression of an honest and conscientious opinion, or because found visiting with those held under suspicion. During the late Communist raids under orders from the Department of Justice persons were taken into custody merely because they called to see their friends in jail, "for their coming to inquire was *prima facie* evidence of affiliation with the Communist Party."⁶

In order to show how far even judges may be carried away by a present fever of excitement Prof. Chafee⁷ quotes Judge Aldrich, of New Hampshire:⁸

"These are not times for fooling. The times are serious. Nobody knows what is going to happen to our institutions within the next year, or the next month. Out West they are hanging men for such things as this man is accused of saying. They are feeling outraged by such expressions to such extent that they are taking the law into their own hands. Now, that is a very bad thing to do. We do not want that to happen in New Hampshire, but we want a courageous enforcement of the law."

(6) Chafee, *Freedom of Speech*, 246.

(7) *Freedom of Speech*, 81.

(8) *United States v. Taubert*.

Taubert had said that this was a Morgan war and not a war of the people, and was sentenced to three years for obstructing bond sales, it being held that "the government must not be embarrassed by unreasonable opposition," though the Act of 1917 says nothing about bond sales. One is instinctively reminded by exudations of the kind of this learned judge of that honest but obstinate old nobleman in Dicken's "Bleak House," Sir Leicester Dedlock, who was forever seeing the foundations of government undermined and the reincarnation of some Guy Fawkes with another Gun Powder Plot to blow up the Houses of Parliament.

The reasons given for the passage of such laws as the Espionage Act and laws against seditious acts and utterances, which are so drawn as to punish for things so occult as to be practically a guess at what is inside of a man's head, are that they conduce to law and order and tend to inculcate a greater respect for legal authority. But do they do these things? They never have. An idea is an idea and is so much a part of its possessor as to be incapable of eradication by mere legislative enactment. That has been tried time and again and has always failed. It may be done by precept and example, but legislation can at most only succeed in preventing its vocal expression. But if the idea does not find vent in one way it will in another. If a man be denied the right to speak his sentiments, he is apt to vent them in overt acts—in bomb-throwing or plots against government, or in destroying life and property. In his brief for the New York Socialist Assemblymen Justice Hughes said that "Hyde Park meetings and soap-box oratory constitute the most efficient safety-valve against resort by the discontented to physical force."⁹ And Mr. Justice Holmes has said, in his character-

(9) Chafee, *Freedom of Speech*, 189.

istically happy vein, "with effervescing opinion, as with the not yet forgotten champagnes, the quickest way to let them get flat is to let them get exposed to the air."¹⁰

After two attempts had been made on the Emperor of Germany's life Bismarck had a law enacted "against the generally dangerous efforts of Social Democracy," then advocating the overthrow of capitalistic society by forcible revolution. The party prospered under the law more than ever before. The law was repealed, and the party became conservative.¹¹ Legislation to break up Trade Unions in England only strengthened the Unions and increased the bitterness of their members.¹² And drastic action against

(12) *Id.*, 192.
the Industrial Workers of the World has merely served to shunt numerous members of that organization into the American Federation of Labor, where they can do infinitely more harm.¹³ Scarcely more truthful words could be uttered concerning the effect of suppression upon the community than those used by Hume in his History of England. He is speaking of religious persecution, but his words are just as applicable to suppression of secular forms of belief. They are:

"Where a violent animosity is excited by oppression, men naturally pass from hating the persons of their tyrants to a more violent abhorrence of their doctrines; and the spectators, moved with pity toward the supposed martyrs, are easily induced to embrace those principles which can inspire a confidence which appears almost supernatural."

Returning for a moment to the beginning of this article, it was said that habits of unrestrained public speaking by the Greeks resulted in the development of the habit of scientific thought. This was one of the prime considerations of the framers of the First Amendment. In of the press. "The importance of this,"

1774, the Continental Congress, addressing the inhabitants of Quebec, declared that the English Colonists had five invaluable rights, the last being the freedom they say, "consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiment on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs."¹⁴

And Jefferson's words in the Virginia Act establishing Religious Freedom are as true of the dangers of allowing the magistrate to intrude his powers into other fields of opinion as into the field of religion:

"To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own."¹⁵

And in the final analysis it will be probably found that the opinion of the magistrate will be very much the same as that of his environment. "I have now completed my review of the history of Witchcraft," Lecky informs us. . . . "I have shown that witchcraft resulted, not from isolated circumstances, but from modes of thought. . . . Arising amid the ignorance of an early civilization, it was quickened into an intenser life by a theological struggle which allied terrorism with credulity, and it declined under the influence of a great rationalistic movement which, since the seventeenth century, has been on all sides encroaching on theology."¹⁶

(10) 21 The New Republic, 250.

(11) Chafee, Freedom of Speech, 263.

(13) *Id.*, 192.

(14) Chafee, Freedom of Speech, 17.

(15) Chafee, Freedom of Speech, 31.

(16) 21 The New Republic, 250.

The point is, judges—except the more conservative—and juries see red because they are in an environment of red, because the very air they breathe is surcharged with the red hysteria. Judge Aldrich, above quoted, was a victim of this sentiment, and because men were being hanged out West for opinions it was proper to send a man to the penitentiary because he said this was a Morgan war—a mere opinion, not true of course, but one that many held and uttered during those trying days.

Men get in the habit of thinking that radical and irrational treatment of those who differ from them in opinion is in the interest of law and order, when in point of fact it is but a reflection of present sentiment blinding them to what the law and the facts really are. Three years from the world war many still believe most of the propaganda that was bruited about the country during that terrible holocaust, yet Judge George W. Anderson, whose intimate association with those charged with the discovery and prosecution of those connected with pro-German plots, should constitute him a competent witness, has said:

"Now, I assert on my best judgment, grounded on the information I can get, that more than ninety-nine per cent. of the advertised and reported pro-German plots never existed. I think it is time that publicity was given to this view. I doubt the Red menace having more basis in fact than the pro-German peril. I assert the significant fact that many of the same persons and newspapers that for two years were faking pro-German plots are now promoting the Red Terror. . . . I cannot say there will not be some bomb-thrower. A fraction of one per cent of the pro-German plots actually existed. There are Reds—probably dangerous Reds. But they are not half so dangerous as the prating pseudo patriots who, under the guise of Americanism, are preaching murder, 'shootin'-at-sunrise,' and to whom our church parlors and other public forums have hitherto been open. . . . The heresy-hunter has throughout history been one of the meanest of men. It is time we had freedom of speech for the just contempt that every whole-

some-minded citizen has and should have for the pretentious, noisy, heresy-hunter of these hysterical times."¹⁷

The truth is, in the passage of many laws by Congress and the State Legislatures for the searching out and punishing of every utterance, phase of opinion and shade of thought that can possibly be tortured into a criticism of government, we as Americans have lost our perspective. We call it Americanism. It is the remotest possible thing from Americanism. Americanism means freedom of thought, speech, action, locomotion and opportunity insofar as their exercise does not interfere with the just rights of others. It means the right to criticize public officers and public modes of administration, to point out mistakes, suggest improvements and in general to do and say all things that we presume to be for the common good. And this presumption is not to be construed in any narrow sense either, for commonly no man can say to a dead certainty that another is wholly wrong. It no doubt seemed very absurd to the people of his day for Galileo to assert that the earth moved, and yet the truth of his theory is now universally conceded. Columbus set down as a fundamental axiom that the earth was a terraqueous sphere, and those of his day looked at him askance. Yet we have long known he was right. What may appear a monumental absurdity today may be found to be a mighty truth tomorrow. And all along the line of discovery, invention, improvement and progress the forerunners of these have been called dreamers, cranks and fools. Given time, one will prove one's thesis to be true or one's opponents will prove it to be untrue.

Nor is one under the liberal rules laid down by the framers of the First Amendment bound to be entirely temperate in his language when opposing what he believes to be wrong. The more a man feels an injustice is being done the more apt he is to clothe his thoughts in colorific expressions

(17) 21 The New Republic, 251.

of vituperation. One does not always pause to control one's language under strong feeling in the denunciation of that which one conceives to be pernicious. To be sure, there is a point where freedom of speech must stop, as has been said before, but such abuses are substantially all taken care of by the normal law, so that the wrongdoer, if the law be enforced, cannot escape the consequences of his misdoings. But this normal law does not militate against the right of anyone to speak the truth, with good motives and for justifiable ends, about any public matter or policy or individual.

If we go back to the period in which the framers of the First Amendment lived, we shall readily understand why they were so palpably jealous of the freedom of speech. They lived in the days of the persecution of Wilkes because of his contention for the right of a free press. The echoes of that titanic struggle, marking the culmination of years of effort on the part of the English people for rights they had almost despaired of achieving, were still ringing in their ears. The First Amendment was written by men to whom Wilkes and Junius were household words. (Chaffee, *Freedom of Speech*, 23). They had seen this great reform accomplished in the Mother Country. They could not afford to risk its loss to the Republic. As was said by the Supreme Court of Nebraska.¹⁸

"The privilege of speaking and publishing the truth with good motives and for justifiable ends was not inserted in the Bill of Rights by accident. The doctrine that the truth as to a man's conduct is no justification for publishing it in the press originated in the Star Chamber, and was in high favor in that tribunal when printing became an effective means of disseminating what honest men said about the abuses of official power and conduct and policies of public men. The hostility to such a restriction of free speech and of a free press resulted in the adoption of section 5 of the Bill of Rights."

(18) *State vs. Junkin*, 85 Neb. 1.

And so we have seen men of outstanding character and ability and of the most sterling Americanism contending valiantly throughout our national life for this right and other related rights. Hamilton defended the British Loyalists, John Adams the British soldiers engaged in the "Boston Massacre," James Madison opposed the Alien and Sedition Laws, while Charles Evans Hughes came bravely to the defense of the New York Socialist Assemblymen. With these splendid examples of true Americanism for our guidance there is hope of our eventual escape from the present hysteria of un-American legislation, state and national, which stands as a blot upon over a hundred years of uninterrupted freedom of speech in this country and in derogation of the First Amendment to the Federal Constitution, in force in 1791. In this matter of speech we may well copy after the ancient Athenians, the scientific attainments of whom have been attributed by eminent authority to their unrestricted interchange of thought. Above all, we should ponder deeply the reasons why the founders of our state were so profoundly sensitive of the preservation of freedom of speech as to insist on its specific reservation in the First Amendment. For we need to reflect that the danger to our future may be far greater from suppression of speech than from the fulmination of doctrines which we dislike or detest.

ELWOOD S. JONES.

Rising City, Neb.

UNFAIR COMPETITION—CARTOONS.

FISHER V. STAR CO.

132 N. E. 133.

Court of Appeals of New York, July 14, 1921.

CHASE, J.—This action is brought to enjoin the appellant from what the respondent asserts is unfair competition in making and publishing cartoons. The question on this appeal is whether the courts should use the equitable

jurisdiction given to them to restrain a person or corporation from using in a cartoon, or in cartoons prepared for publication and sale as a business, certain grotesque figures, being imaginary and fictitious characters and the names applied to them, when such figures and names were originated and have been applied and used by a person in connection with his work as a cartoonist until they have become well known and have as such figures or characters, with their names, a definite place among cartoonists and the admirers of cartoons, and with the public at large, and as such are of substantial value. The plaintiff does not assert his right to injunctive relief by virtue of the copyright law, the enforcement of which is confined to the federal courts. U. S. Compiled Statutes 1918, §§ 9555, 9556. He does not assert his claim by virtue of the federal Trade-Mark Law (Act Feb. 20, 1905 [U. S. Comp. St. §§ 9485, 9487-9511, 9513-9516]) or the statutes relating to trade-marks in this state (see Laws of 1909, cc. 9, 25, 36, and 88; Penal Law, §§ 2350 to 2357 [Consol. Laws, c. 40]), or in other states.

The statute creating the Federal Trade Commission (Act Sept. 26, 1914, [U. S. Comp. St. §§ 8836a-8836k]) and giving it authority to prevent unfair methods of competition does not apply to unfair methods between individuals. The unfair methods contemplated by the act are such as affect the public generally. *Federal Trade Commission v. Bratz*, 258 Fed. 314, 169 C. C. A. 330, 11 A. L. R. 793. To sustain his claim the respondent relies entirely upon the authority of the courts in equity to prevent what is known as unfair competition.

A person who uses an unregistered name or mark can prevent others using the same so as to deceive the public into thinking that the business carried on by such persons and the goods sold by them are his. 27 Halsbury's Laws of England, 744. Such conduct as is calculated to deceive the public into believing that the business of the wrongdoer is the business of him whose name, sign, or mark is simulated or appropriated can be restrained in equity. *Ball v. Broadway Bazaar*, 194 N. Y. 429, 87 N. E. 674; *Westcott Chuck Co. v. Oneida National Chuck Co.*, 199 N. Y. 247, 92 N. E. 639, 139 Am. St. Rep. 907, 20 Ann. Cas. 858; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Fox Co. v. Glynn*, 191 Mass. 344, 78 N. E. 89, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619.

The courts are not confined in the exercise of their equitable powers to preventing unfair competition among the manufacturers of an

dealers in goods. The controlling question in all cases where the equitable power of the courts is invoked is whether the acts complained of are fair or unfair. The determination of this appeal depends first and primarily upon the facts. *Higgins Co. v. Higgins & Co.*, 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; *Howe Scale Co. v. Wyckoff, Seamans, etc.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; *Kropf v. Furst* (C. C.) 94 Fed. 150. The inquiry is whether the use of the names "Mutt" and "Jeff" and the grotesque figures to which the names are applied by the appellant would be unfair to the respondent. A statement of the facts found at the special term has been given preceding this opinion, at unusual length, because it will obviate the necessity of stating many of them in the opinion, and also because the true basis of the decision herein cannot be fully understood without a complete knowledge of the facts on which it depends. *Baker & Co. v. Sanders*, 80 Fed. 889, 891, 26 C. C. A. 220. The facts as found were unanimously affirmed at the Appellate Division (*Fisher v. Star Co.*, 188 App. Div. 964, 176 N. Y. Supp. 899), and are conclusive upon this Court. Constitution, art. 6 § 9; *Porter v. Municipal Gas Co.*, 220 N. Y. 152, 115 N. E. 457.

The rules stated as to competition in business apply to the publication of books under a particular name. Such a name is the subject of property, and a colorable imitation of the name adopted by one publisher, by another engaged in publishing similar books by which the public may be easily misled into supposing that it was the literary article they desired to obtain, is an act of deception which injures the publisher who first adopted the name and which he may call upon a court of equity to redress. *Munro v. Tousey*, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245.

Trade-marks may consist of pictures, symbols of a peculiar form, or fashion of label, or they may consist simply of a word or words. *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589. Any civil right not unlawful in itself nor against public policy, that has acquired a pecuniary value, becomes a property right that is entitled to protection as such. The courts have frequently exercised this right. They have never refused to do so when the facts show that the failure to exercise equitable jurisdiction would permit unfair competition in trade or in any matter pertaining to a property right.

In *International News Service v. Associated Press*, 248, U. S. 215, 39 Sup. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293, the Associated

Press sought to enjoin the International News Company from appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications as constituting unfair competition in trade. It was not claimed that the news articles were protected by copyright. The court say:

"We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. * * * In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right. * * * And the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. * * * It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition." 248 U. S. 234, 236, 39 Sup. Ct. 71 (63 L. Ed. 211, 2 A. L. R. 293).

The appropriation of the news gathered by the Associated Press was enjoined.

In *Bell v. Locke*, 8 Paige, Ch. 75, 34 Am. Dec. 371, the plaintiff sought to restrain the defendant from assuming the name of the plaintiff's newspaper for the fraudulent purpose of imposing upon the public and supplanting him in the good will of his paper. It was held that by simulating the name and dress of his newspaper with the intent to cause it to be understood and believed by the community that the defendant's newspaper was the same as the complainant's, and thereby to injure the circulation of the latter, the plaintiff would be entitled to an injunction; for, although the business of publishing newspapers ought, in a free country, to be always open to the most unlimited competition, fraud and deception certainly are not essential to the most perfect freedom of the press. There is indeed no patent right in the names. There can be very little excuse for the editor of a newspaper who shall adopt the precise name and address of an old established paper which would be likely to interfere with the good will of the latter by actually deceiving its patrons.

In *Estes v. Williams* (C. C.) 21 Fed. 189, it appears that a person in London, England, published a series of juvenile books of uniform appearance and in a style of peculiar attractiveness and called them "Chatterbox" until they became widely known and quite popular by that name in that country and this. He assigned the exclusive right to use and protect that name in this country to the

plaintiff. The defendants commenced the publication of a series of books and called them by that name and made them so similar in appearance and style as to lead purchasers to think that they are the same. Held, that the plaintiff was entitled to equitable relief.

The principle which interdicts unfair competition in trade will protect a publisher who has imparted to his books peculiar characteristics which enable the public to distinguish them from books published by others and containing the same literary matter against the copying of the characteristics though the copyright on the literary matter has expired. *Merriam Co. v. Straus* (C. C.) 136 Fed. 477; *Merriam Co. v. Saalfeld Pub. Co.*, 238 Fed. 1, 151 C. C. A. 77.

Even in the case of a patented article like the Singer sewing machine, where on the expiration of the patent the right to use the name of the patentee passes to the public, it is unlawful to so design a machine and place the name thereon as to deceive the public into believing that the machine made by a new company was actually made by the old Singer Manufacturing Company. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

In *McLean v. Fleming*, 96 U. S. 245, 251 (24 L. Ed. 828), it was held that no trader can adopt a trade-mark so resembling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled. The Court in discussing the question say:

"Equity gives relief in such a case, upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture; he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer."

It appears from the findings of fact that the grotesque figures in respondent's cartoons, as well as the names "Mutt" and "Jeff" applied to them have in consequence of the way in which they have been exploited by the respondent and the appearance and assumed characters of the imaginary figures have been maintained, acquired a meaning apart from their primary meaning, which is known as a secondary meaning. The secondary meaning that is applicable to the figures and the names is that respondent originated them and that

his genius pervades all that they appear to do or say.

It also appears from the findings of fact that the respondent is the owner of the property right existing in the characters represented in such figures and names. They are of his creation. They were published and became well known as distinct characters before the contract was made with the appellant. Property rights in literary and other property, the product of the brain as between employer and employee, are determined by what was contemplated by the contract of employment. *Root v. Borst*, 142 N. Y. 62, 36 N. E. 814.

While the contract with appellant contemplated that the respondent should draw cartoons in the form of comic strips in which he would use the figures known as "Mutt" and "Jeff" and the names connected therewith as he had done prior to such contract, it did not purport to sell to appellant his property rights then existing or which might be acquired thereafter. The contract with appellant expired on August 8, 1915. The common law right of property that the plaintiff had in particular cartoons was lost when they were severally published. *Caliga v. Inter Ocean Newspaper Co.*, 215 U. S. 182, 30 Sup. Ct. 38, 54 L. Ed. 150. The respondent does not claim to the contrary. If the copyrights were to be considered, it would appear that the respondent was the first to copyright one of his cartoons containing the well-known figure of "Mutt" and in which the name "Mutt" was applied to the figure. He also copyrighted the book in which the cartoons were designated as "The Mutt and Jeff Cartoons. By Bud Fisher." (See decision December 22, 1916, by examiner of interferences denying an application of the Star Company to cancel the registration by Fisher of the words "Mutt and Jeff" as a trade-mark, March 9, 1915. *Official Gazette of the United States Patent Office*, vol. 236, No. 1, p. 283.) The name "Bud Fisher" was used by the respondent in connection with his work as a cartoonist.

As we have already stated, it is unnecessary to discuss the question of the rights of the public or of the appellant to reproduce the particular cartoons that have been published because the plaintiff's claim in this action rests upon other facts and principles as stated herein. The figures and names have been so connected with the respondent as their originator or author that the use by another of new cartoons exploiting the characters "Mutt

and Jeff" would be unfair to the public and to the plaintiff. No person should be permitted to pass off as his own the thoughts and works of another.

If appellant's employees can so imitate the work of the respondent that the admirers of "Mutt and Jeff" will purchase the papers containing the imitations of the respondent's work, it may result in the public tiring of the "Mutt and Jeff" cartoons by reason of inferior imitations or otherwise, and in any case in financial damage to the respondent and an unfair appropriation of his skill and the celebrity acquired by him in originating, producing and maintaining the characters and figures so as to continue the demand for further cartoons in which they appear.

The only purpose that another than respondent can have in using the figures or names of "Mutt" and "Jeff" is to appropriate the financial value that such figures and names have acquired by reason of the skill of the respondent.

All concur, except CRANE, J., who dissents on the ground that plaintiff seeks to maintain rights which can only be had under the copyright law. The copyright law does not apply, and the plaintiff has no rights thereunder. This action in my judgment is in effect a substitute for the rights which the plaintiff might have had under the copyright law.

Judgment affirmed.

NOTE—Right of Cartoonist to Protection of His Work.—In addition to the many cases cited and discussed in the foregoing published opinion reference might be made to that of *Outcalt vs. New York Herald*, 146 Fed. 205. A cartoonist had made pictures for a comic section of the *New York Herald* in which "Buster Brown" was the principal figure. A similar comic section was printed by a newspaper published by the appellant, and the *New York Herald Company*, brought an action against the appellant. From the opinion in that case it appears that the suit was solely to restrain an infringement of a trade-mark and the court says: "No question as to copyright or as to unfair competition is presented."

In the case of *New York Herald Company vs. Ottawa Citizens' Company*, 41 Can. Sup. Ct. 229 it was held that the term "Buster Brown" or "Buster Brown and Tige", used as the title to a comic section of a newspaper, cannot be registered as a trade-mark. The Court said: "The production which the appellant sells is not a kind of paper, or of paper colored in any particular way or covered with a peculiar kind of ink or set form or figures. It is the nonsense that is produced by the brain of the man writing for the diversion of the idle that in truth is sold. It may be that kind of brain product that the copy-

right might amongst other things be extended to or that copyright might cover. * * * I am quite sure it never was intended those sections should apply to such a thing."

"Unfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor. Furthermore it is held that one who offers the goods of one manufacturer under the well known names and established reputation of articles of another manufacturer for the purpose of deceiving the public and defrauding the latter aggravates, rather than justifies, his wrong by placing his own name on the packages. The same principle has also been applied in the case of newspapers and other publications." 26 R. C. L. 875, 876.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE KANSAS BAR ASSOCIATION

The 39th annual convention of the Kansas Bar Association will be held at Hutchinson, Nov. 21st and 22nd, 1921, with headquarters at the Bisonte Hotel.

The President's address will be delivered by Mr. Ben S. Gaitskill of Girard. Following his address will be the usual reports of the Secretary, Treasurer, Executive Council and standing committees.

The morning session of Nov. 21st will close with an address by a representative of the University of Kansas Law School on the subject, "The Doctrine of Public Interest Impressed Upon Private Property." In the afternoon of Nov. 21st Mr. F. Dumont Smith of Hutchinson will address the Association on the subject, "Shall the Bar Association of the State of Kansas Make Recommendations to the Electors With Reference to Candidates for Judicial Offices in the State?" A general discussion of this subject will be in charge of Mr. C. M. Williams, of Hutchinson. In the evening Hon. Cordenio A. Severance, of St. Paul, President of the American Bar Association, will deliver the annual address. His subject will be, "Present Day Problems."

Tuesday, Nov. 22d, will be devoted to the business of the Association. There will be memorial services before the Supreme Court for members of the bar of Kansas who gave their lives in the Service. There will be unveiled a bronze tablet, presented by the Bar

Association, and the acceptance of the tablet by the Supreme Court.

One of the interesting reports of a special committee will be that on the incorporation of the Bar of Kansas. A discussion of this report will probably take a large part of the evening session.

The banquet will be at 6:30 Tuesday evening.

CONSTITUTIONALITY OF THE NINETEENTH AMENDMENT

A motion has been made in the Supreme Court of the United States to advance the case of *Fairchild v. Hughes* (Oct. 7, 1921, No. 143) on the docket for an early hearing in view of the important issue therein.

This case involves the constitutionality of the nineteenth amendment. It was brought in the Supreme Court of the District of Columbia before the Secretary of State issued his proclamation declaring the ratification of the nineteenth amendment by three-fourths of the states under Article V of the Constitution. It was brought to restrain him from issuing the proclamation declaring such ratification and to restrain the Attorney-General of the United States from enforcing the provisions of the said amendment if it should be declared by the Secretary of State to have been ratified by three-fourths of the states and to have become an integral part of the Constitution of the United States. Process was served upon the Secretary of State and on the Attorney General before the said proclamation was issued and the Court is asked to direct the Secretary of State to rescind the proclamation of ratification which he made *pendente lite* and with knowledge that the suit was brought to enjoin him from so doing. This proclamation now appears upon the official edition of the laws of the United States and is *prima facie* evidence of the existence and validity of the said nineteenth amendment.

This case brings up for consideration several interesting questions, some of which have already been decided in the cases involving the constitutionality of the eighteenth amendment. These points are as follows:

1. It involves the question whether the ratification of the Constitution by the thirteen original states was upon the condition that certain amendments to constitute a bill of rights should be adopted and become an integral part of that instrument, and should express fundamental rights of the states and the citizens thereof which could not be divested in the case of any state except by its consent.

2. It involves the question whether a state can be said to have the republican form of government which is guaranteed by § 4, Article IV of the Constitution, when, without its consent, it is deprived of the right to regulate the suffrage within that state for the officers thereof.

3. It involves the question whether the said nineteenth amendment is beyond the scope of the power to amend, conferred by Article V of the Constitution, and it involves an examination into the validity of the ratification of the nineteenth amendment by numerous state legislatures. The Secretary of State held that he had no power to enquire into the validity of any such ratifications and refused to examine the same.

CORRESPONDENCE.

REFORMING THE LAW RELATING TO REMOVAL OF CAUSES.

Editor, Central Law Journal:

In your correspondence column this week there appears a letter to the editor of the *Central Law Journal*, written by Mr. Everett P. Wheeler, setting forth the recommendations of the Committee on Jurisprudence and Law Reform of The American Bar Association.

Recommendation numbered one is a bill which would "in effect give to the defendant where the cause is otherwise removable the right to remove to the District in which the suit is brought, even though it could not originally have been brought in that District."

It would seem that there can be no logical reason why a cause which cannot be brought originally in the Federal Courts should be removable thereto when commenced in the State Courts.

The writer would very much appreciate an explanation by Mr. Everett P. Wheeler of the true reasons for this recommendation, the names of those introducing the same, and an explanation of the advantages to be gained by Congressional action in accordance with such a recommendation.

Will Everett P. Wheeler kindly explain the purposes and advantages of this "much needed reform"?

Respectfully,

IRL MORSE.

St. Paul, Minn.

[We have asked Mr. Wheeler to explain the recommendation referred to by our correspondent.—Ed.]

HUMOR OF THE LAW.

Visitor to Public Library: I'd like to see some standard works on the chemistry of fermentation, please.

Librarian: You'll have to wait your turn, sir. All the books we have on the subject are in use. Just take your place at the end of that long line of people over there.

Mrs. Lafferty: "Tin stitches did th' doctor have to take in me ould man."

Mrs. O'Hara: "Tin, was it, only tin? Sure, when th' doctor seen my poor husban' carried fr' th' wreck on th' railroad, he sez, sez he: 'Do there be no one here wid such a t'ing as a sewing machine?'"

William Lawrence, Bishop of Massachusetts, told this story at a recent reunion of the class of '71, at Harvard College:

"Once when there was a vacancy in the Massachusetts bishopric, Phillips Brooks was the most likely candidate. I was walking with President Eliot one day and, in the course of conversation, I said to him, 'Do you think Brooks will be elected?'"

"'Well, no,' said Dr. Eliot, 'a second or third rate man would do as well.'"

"Phillips Brooks was elected and a short time afterward Dr. Eliot and I were walking again. 'Glad Brooks was elected, aren't you?' I asked.

"'I suppose so,' returned Dr. Eliot, 'but to tell the truth, William, you were my man.'"—*Everybody's for November.*

Six jurymen had been excused on one pretext or another, and when the judge reached the seventh he waxed sarcastic. "Does your sick wife need your attention?"

"No, sir; I ain't married," was the reply.

"What about your business?" was inquired.

"Haven't got any."

"No fence to fix up?"

"Haven't got a fence on the place," was the response.

"You think you can spare a little time to serve on the jury.

"I do, sir," came the prompt reply.

The judge meditated.

"You seem to be the only man who has got time to serve his country as a jurymen," he said. "Would you mind telling me how it happens?"

"Certainly!" replied the juror. "You're going to try Jim Billings, ain't you? Well, he shot a dog of mine."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Acknowledgment**—Presumed to be True.—A certificate of acknowledgment will not be overthrown on evidence of a doubtful character, such as the unsupported testimony of interested witnesses, or on a bare preponderance of the evidence, but only by proof so clear and convincing as to amount to a moral certainty. *Kelly v. Kelly*, N. Y., 189 N. Y. S. 804.

2. **Attorney and Client**—Authority of Attorney.—An attorney at law has no authority to bind his client by a compromise agreement resulting in a consent judgment in direct opposition to the instructions of his client, and with the knowledge of the adverse party of such violation of instructions. *Patterson v. Georgia Gravel Co.*, Ga., 108 S. E. 237.

3. **Automobiles**—Duty to Guest.—An automobile driver is required to use reasonable and ordinary care not to increase the danger to one riding with him by invitation by fast and reckless driving, and if injury to the guest was directly or proximately caused by the driver's negligence, he is liable, in the absence of contributory negligence. *Spring v. McCabe*, Cal., 200 Pac. 41.

4. **Bankruptcy**—Voluntary Petition.—Directors of a Delaware corporation, with by-laws conferring on the directors power to manage the business and property of the corporation, and also general power to do all lawful acts and things not directed or required to be done by the stockholders, held to have power to authorize the filing of a petition in voluntary bankruptcy. *In Re Ann Arbor Mach. Corporation*, U. S. C. C. A., 274 Fed. 24.

5. **Banks and Banking**—Insolvency.—Suit of the liquidating agent of an insolvent Oklahoma bank for debt and foreclosure of an alleged lien on an oil and gas lease held not on a promissory note and drafts executed and drawn by the defendant and also on an agreement in an accord and satisfaction settlement, in violation of plaintiff's inability to sue both on the instruments of liability and on the contracts attached to his petition. *Golden Rod Oil Co. No. 1 v. Noble*, Tex., 233 S. W. 524.

6. **Liability for Note**—The cashier of a bank, clothed with more power than cashiers ordinarily have, being in active control of all the bank's business, exercising and possessing full power to act in all matters, could bind the bank by accepting a note executed by the maker to the bank on condition he should not be held liable thereon, and in suit by the bank's successor against the maker on such note, such agreement made by the predecessor bank's cashier constitutes a defense. *Central Bank of Bingham v. Stephens*, Utah., 199 Pac. 1018.

7. **Receiver of National Bank** is "Officer of United States."—A receiver of an insolvent

national bank is an "officer of the United States," within the meaning of Criminal Code, § 97, and Act March 4, 1911, and subject thereunder to prosecution for embezzlement of the funds of the bank, or for making a false report of its condition with intent to deceive. *Weitzel v. United States*, U. S. C. C. A., 274 Fed. 101.

8. **Refusal of Draft**—In an action against a bank, which refused to pay a draft drawn against a letter of credit issued by it, only the reason given by the bank for its refusal to pay can be considered. *International Banking Corp. v. Irving Nat. Bank*, U. S. D. C., 274 Fed. 122.

9. **Bills and Notes**—Bona Fide Holder.—A bank purchasing with full knowledge that the note was given to pay insurance premium prior to delivery of policy held not a bona fide holder. *Stockmen's State Bank v. Fisher*, Neb., 184 N. W. 55.

10. **Ownership**—In action against a corporation on its bond certificates by original promisee's assignee, the possession of the certificates by the promisee at the time of assignment to plaintiff, and his act in assigning them, was presumptive evidence of delivery to him and of his ownership of certificates at the time he made the assignment, under Code Civ. Proc. § 1963, subd. 12. *Snyder v. United Properties Co.*, Cal., 200 Pac. 366.

11. **Proper Signature**—Under Code 1907, § 1, defining signature as including mark, etc., where defendant signed a note by mark, and it was witnessed by the payee's wife, there was a sufficient attestation and signature if she could not write. *Smith v. Vaughn*, Ala., 89 So. 302.

12. **Renewal**—Although a note and mortgage were given in bulk renewal of two notes, they were supported by an adequate consideration of money lent. *Henson v. Gunn*, Ala., 89 So. 288.

13. **Cancellation of Instruments**—Counterclaim.—There being doubt as to the right of defendant fire insurer to assert as a defense to the action a certain condition of facts tending to show plaintiff had not complied with a condition precedent to issuance of policy to him, defendant insurer is entitled to assert on the facts alleged its counterclaim for rescission of the contract on tender of the amount received for premium that the whole issue may be presented to the court. *Park & Pollard Co. v. Industrial Fire Ins. Co.*, N. Y., 189 N. Y. S. 866.

14. **Laches**—Where the heirs waited six years after acquiring constructive notice of deeds delivered at grantor's death by the recording thereof, and after possession was taken by the grantees and the property was omitted from the inventory of the grantor's estate during which time the grantees had made improvements on the property and had sold some of it, the heirs were guilty of such laches as bars their right to attack the deed for want of failure of delivery in grantor's lifetime. *Pickens v. Merriam*, U. S. C. C. A., 274 Fed. 1.

15. **Carriers of Goods**—Bill of Lading.—Where a carrier has filed a form of bill of lading for interstate shipments with the Interstate Commerce Commission and such form has been approved by the Commission, a provision therein to the effect that no claim for loss or damage can be enforced unless notice of such claim was given in writing within the time prescribed therein cannot be waived by the carrier. *Carbic Mfg. Co. v. Western Express Co.*, Minn., 184 N. W. 35.

16. **Carriers of Live Stock**—"Inherent Vice."—An instruction that "inherent vice" in an animal is some quality or characteristic of the animal that brings about its own injury or destruction, without fault on the part of any other supervening cause, was in the main correct, and no probable error was shown by its submission. *Texas & P. Ry. Co. v. Prunty*, Tex., 233 S. W. 625.

17. **Carriers of Passengers**—Defective Door.—That a door of an interurban car equipped with an automatic catch or spring to keep the door open closed on a passenger's hand spoke for itself, and raised an inference that the catch was defective, though there was testi-

mony that, after the accident the conductor examined the catch and found it in good condition. *Anderson v. Kansas City Rys. Co. Mo.*, 233 S. W. 203.

18. **Constitutional Law.**—**Ball Rent Law.**—The provision of Ball Act, §§ 106, 108, making the findings of the rent commission, from which no appeal was taken, final and conclusive, is constitutional since the act provides for a hearing after notice, and for an appeal from the commission's decision, which satisfies the guaranty of Const. Amend. 5, against deprivation of property without due process of law. *Killgore v. Zinkhan, D. C.*, 274 Fed. 140.

19. **Disloyal Utterances.**—**Language** charged to have been used by defendant in referring to the President and the army when the United States was at war, in violation of Espionage Act June 15, 1917, tit. 1, § 3, as amended by Act May 16, 1918, § 1, held not within the protection of Const. U. S. Amend. 1. *Dierkes v. United States, U. S. C. C. A.*, 274 Fed. 75.

20. **Meaning and Effect of Constitution.**—A constitution intended as the fundamental law for the government of the state cannot be subject in its meaning and effect to another instrument, as it would not then be final, and such other instrument would be the paramount law. *Loring v. Young, Mass.*, 132 N. E. 65.

21. **Corporations.**—**Place of Meetings.**—Under the general rule that a corporation as an artificial person must dwell in the state of its creation, and has no legal existence outside of the boundaries of the sovereignty by which it is created, its incorporators or stockholders, as the corporate entity, cannot hold meetings in another state for the performance of strictly corporate functions, such as accepting the charter and organizing the corporation. *Hening & Hagedorn v. Glanton, Ga.*, 108 S. E. 256.

22. **Stock Transfers.**—Where the corporation recorded the transfer of stock on the stubs from which the certificates were detached and kept no other record thereof, such stubs constituted the transfer book of the corporation and were evidence of the transfers noted thereon. *Ohman v. Lee, Minn.*, 184 N. W. 41.

23. **Ultra Vires.**—Where, on a sale of property by an insurance company to a realty company, stockholders were invited to exchange their stock for stock in the realty company, stockholders who participated in the exchange could not attach the sale as ultra vires, illegal, and void. *Tryson v. Southern Realty Corporation, D. C.*, 274 Fed. 135.

24. **Damages.**—**Loss of Profits.**—In an action by a lessee of the exclusive right to operate a certain game at a pleasure resort, against defendant, who had induced the lessor to break its contract with the lessee, and permit defendant to operate such a device, the lessee was limited in its recovery to damages sustained, and could not recover profits of defendant, since such profits could be recovered only if the defendant had used plaintiff's property. *Gonzales v. Reichenthaler, N. Y.*, 189 N. Y. S. 783.

25. **Dedication.**—**Public Use.**—It is not essential to constitute a valid dedication to the public that the right of use should be vested in a corporate body. If there be a dedication of land to public use prior to the existence of a municipal corporation then, upon such corporation being organized, including such land within its limits, the use of the land in trust for the public at once vests in it. *City of La Fayette v. Walker County, Ga.*, 108 S. E. 218.

26. **Electricity.**—**Franchise.**—Where an electric company furnished electricity for lighting under a constitutional franchise under Const. art. 11, § 19, it did not surrender that franchise by becoming a bidder for and accepting a franchise under Oakland City Charter, art. 20, and a provision of the latter franchise for payment to the city of a percentage of the gross receipts is invalid as far as concerns revenues from electricity furnished for lighting purposes. *City of Oakland v. Great Western Power Co., Cal.*, 200 Pac. 395.

27. **Obligation to Furnish.**—A public service corporation such as an electric light and power company cannot, by procuring a fran-

chise to supply particular locality, even though the franchise was obtained before passage of the Public Service Act, stand by without taking steps to supply the locality and exclude other companies therefrom. *Fogelsville & Trexler-town Electric Co. v. Pennsylvania Power & Light Co., Pa.*, 114 Atl. 822.

28. **Fraud.**—**Measure of Damages.**—The measure of damages recoverable in an action for deceit in inducing the purchase of stock in a trust company is the difference between the value the stock would have had if defendant's representations had been true and the real value of the stock at the time of its purchase less dividends received by plaintiff, and with interest from the date of purchase. *Morrow v. Franklin, Mo.*, 233 S. W. 224.

29. **Frauds.**—**Statute of—Presumption of Written Contract.**—In an action on a contract within the statute of frauds, on a general demurrer to the petition, a presumption arises that the contract was in writing. *Sonnenberg v. Ernst, Tex.*, 233 S. W. 564.

30. **Royalties.**—An inventor, entitled under a contract to a royalty on every machine manufactured and sold, could recover royalties due on the machines manufactured during the first year, though the contract was for a definite period of time exceeding one year, and was not in writing, as required by the statute of frauds, since where a series of things is to be done occupying in the whole more than 1 year, but each item as it is performed drawing with it a separate liability therefor, the statute of frauds does not prevent an action upon such items as are performed within the year to recover the stipulated compensation. *Price v. Smith Mfg. Co., Cal.*, 200 Pac. 53.

31. **Injunction.**—**Strikes.**—Where employers, whose business require the employment of a number of workmen skilled in a particular trade, determine to operate their business on nonunion basis, and to that end adopt a policy not to employ members of the union, and to employ nonunion workmen under a contract, terminal at will, providing that such employment shall immediately cease if said employees become members of the union, equity will protect by injunction such contractual status as against strangers and striking former employees, who, knowing such status, conspire to coerce the employers to abandon the policy of employing only nonunion labor and to cause a breach of the aforesaid contractual relation, and who endeavor by threats, intimidation, and improper persuasion to deprive such nonunion employees of the exercise of their own freedom of will, and thus induce them to violate their contracts of employment by joining the union, and thus force the unionizing of the plants or render it impossible to continue the operation of the business. *McMichael v. Atlanta Envelope Co., Ga.*, 108 S. E. 226.

32. **Insurance.**—**Military Service.**—Under a life insurance policy limiting the insurer's liability, unless the insured, if he engaged in military service in time of war, paid an extra premium within 31 days, where insured, more than 31 days after entering an officer's training school, wrote to the company's agent, informing him of such fact and asking whether, if he died in the service, his beneficiary could collect, to which the agent replied that she could, but that, when he received his commission he must pay the extra premium, whereupon insured wrote, enclosing a check for the regular premium, and stating he understood from the agent's letter that until he went abroad there was no extra premium, and the agent accepted the premium and made no reply such letter was admissible, the evidence showing it had been received, and the contents, if correctly stated by plaintiff, tending to show waiver, which was for the jury. *Ryan v. New England Mut. Life Ins. Co., S. C.*, 108 S. E. 182.

33. **Representations.**—Admission in proofs of death as to insured's ill health at time policy issued not conclusive as to whether such condition contributed to her death. *Bul-tralik v. Metropolitan Life Ins. Co., Mo.*, 233 S. W. 250.

34. **Payment of First Premium.**—In such case, where a rule of the company permits the

agent to take a note of the insured payable to himself for the first premium, the agent being held responsible to the company for the net premium, the agent becomes the debtor and when he delivers the policy to the insured under an agreement to extend the time of paying the premium and to take the note of the insured for such premium, but no note is given for the reason that the agent had no blank forms with him at the time, and it was agreed that the agent would see insured in a few days and get the note, and the agent left the city two days thereafter without procuring the note, and before his return the insured died, such transaction will be deemed a payment of the premium as between the insured and the company. *Echols v. Mutual Life Ins. Co., Neb.*, 184 N. W. 58.

35. **Intoxicating Liquors**—"Shipment" in Interstate Commerce.—Criminal Code, § 240, making it a criminal offense to "knowingly ship" any package containing liquor from one state into another, unless the package is so labeled as to clearly show the name of the consignee and the nature and quantity of the contents, and subjecting liquor shipped in violation thereof to forfeiture, held not to apply to a carriage of liquor from one state to another by the purpose from a concern which was not a the owner in a truck hired with a driver for common carrier nor engaged in the business of transportation, but in the business of letting trucks, with drivers, by the day or trip. *One Truck Load of Whiskey v. United States, U. S. C. C. A.*, 274 Fed. 99.

36.—"Violation of Law."—The sale of intoxicating liquor in Ohio is a violation of § 9, article XV, of the Constitution of Ohio as amended in November, 1918, and such a sale is therefore a "violation of law" within the meaning and description of § 13195, General Code. *Hoffrichter v. State*, 101 Ohio St. 65, 130 N. E. 157, approved and followed. *Stiess v. State, Ohio*, 132 N. E. 85.

37. **Landlord and Tenant**—Construction of Lease.—Lease requiring lessee manufacturing company to pay for electricity furnished in excess of "eight horse power" held to entitle lessee to electricity to the extent of eight horse power actually consumed, in the absence of a provision specifying whether the power was to be based on the rated capacity of the motors or on the power actually consumed. *Eisenstadt Mfg. Co. v. Star Bldg. Co., Mo.*, 233 S. W. 285.

38.—Option to Purchase.—Where a lease provided an option for renewal for three years from its expiration on same terms and conditions, and not for a new lease containing like agreements and covenants, the right to purchase the demised premises under an option clause of the original lease is not enforceable after expiration of the original lease and renewal under the option, since it was an independent covenant collateral to the demise, and not a term or condition of the demise. *Masset v. Ruh, N. Y.*, 189 N. Y. S. 752.

39.—Unreasonable Rent Statute.—Laws 1920, c. 136, relating to fixing of reasonable rents, does not apply to a lease made prior to April 1, 1920, when the law became operative, since the law has no retrospective application. *Orinoco Realty Co. v. Bandler, N. Y.*, 189 N. Y. S. 855.

40. **Mandamus**—Conformance With Contract.—Where it was the duty of a street railway under its contract with a city to conform its tracks with an altered grade of the street, mandamus would lie to compel the conformance, although the street railway had liabilities of about \$900,000 and cash on hand of only \$450,000, and the city had other paying work in prospect upon streets which, if prosecuted all at once, would be beyond the financial ability of the company, where there were sufficient funds to carry out the project in question. *City of Syracuse v. New York State Rys., N. Y.*, 189 N. Y. S. 763.

41. **Master and Servant**—Duty to Servant.—A master stevedore was under no duty to his

longshoreman employee to look to see whether a steel ledge beneath planks covering a hatch was bent so that it would not support a plank two inches shorter than the opening. *McCabe v. Turner & Blanchard, N. Y.*, 189 N. Y. S. 342.

42.—Fire Clay Works Held a "Mine."—A fire clay company which secured its clay from a mine shaft 70 or 80 feet deep is engaged in operating a "mine," within the meaning of Rev. St. 1919, § 4233, and hence liable for injuries sustained by a servant by reason of negligence of another of its servants. *Jefferies v. Walsh Fire Clay Products Co., Mo.*, 233 S. W. 259.

43.—Interstate Commerce.—A member of a railroad switching crew, injured while walking through the yards from the railroad company's office to an office to which the crews reported for the day's work, was engaged in interstate commerce, where he had been switching interstate cars on the preceding day, and the crew of which he was a member immediately after the injury was switching cars carrying interstate freight. *Rabee v. Boston & M. R. R., N. Y.*, 189 N. Y. S. 863.

44.—Interstate Commerce.—Railroad employee injured while engaged in the repair of an engine which had been placed in the roundhouse for repairs after having finished its round trip, to remain in the roundhouse until completion of the work of repairing, held not engaged in "interstate commerce" at the time of the injury, within the Federal Employer's Liability Act, though the locomotive had been used in both interstate and intrastate commerce before being placed in the roundhouse for repairs, and although it was similarly used after the repairs had been completed. *Payne v. Wynne, Tex.*, 233 S. W. 609.

45.—Loan of Servant.—One who is the general servant of another may be loaned or hired by his master for some special service, so as to become as to that the servant of a third party, in which case, if he is subject wholly to the direction and control of such third party, the latter, and not the general employer, is the master, so far as that particular service is concerned, and is liable for injuries caused by the negligence of such servant while engaged in the duties pertaining thereto. *Burns v. Jackson, Cal.*, 200 Pac. 80.

46.—Negligence.—In action against a railroad and one of its employees for death of another employee, an entry of a judgment for the defendant employee on verdict exonerating him does not require court to grant judgment for the railroad found negligent where the evidence conclusively shows that agents and servants of the railroad other than the one joined as defendant are guilty of negligence contributing as a proximate cause to the accident. *Donald v. Atlantic Coast Line Ry. Co., S. C.*, 108 S. E. 180.

47. **Mines and Minerals**—Invitee.—It being shown in an action for injury to one employed to mine by defendant, that the mining was being done through defendant's procurement, for his benefit and on his premises, over which he retained superintendence and control, maintaining a special timber gang to properly timber the roof to protect miners, if defendant or his timbermen were negligent in properly timbering the roof, and as a proximate consequence plaintiff was injured, he, in the absence of negligence proximately contributing to his own injury would be entitled to recover, though a mere invitee and not an employee. *Freeman v. Worthington, Ala.*, 89 So. 389.

48. **Mortgages**—Foreclosure.—Where pledge foreclosed mortgages held as security for payment of debt, and took other mortgages from third person who purchased the land at the foreclosure sale as trustee for the debtor, as security for the payment of the debt, which mortgages were for a lesser amount than those previously held, pledgee's agreement to advance additional money to debtor on the execution of the mortgages by such third person was without consideration, since the execution of such mortgages was merely the substitution of one security for a lesser amount on the same prop-

erty. *Perkins v. Deal Beach Realty Co.*, N. J., 114 Atl. 853.

49. Municipal Corporations — Excavated Street.—A traveler on a public street or sidewalk may ordinarily presume that the way is clear and in good condition, but, if he knows that it is torn up or obstructed by public work, he cannot go forward relying on such presumption, but must exercise his faculties to discover the dangers, and, if he fails to do so, and is injured thereby, he cannot recover, though the public authorities or contractor may have been negligent. *Waldman v. Skrainka Const. Co.*, Mo., 233 S. W. 242.

50. —Removal of Health Officers.—A resolution of a city board of health appointing a health officer for a term of three years being justified by Health Code, § 31, such appointee holds his office for a term fixed by law, so that the subsequent rescission of such resolution and the appointment of another health officer, was ultra vires and void, the first appointee not being subject to removal during the continuance of his term except for cause; act 1901, § 5, requiring the filling of all vacancies in municipal offices, created by another cause than expiration of term, for the unexpired term only, being inapplicable where the fixation of the term is not attached to the office itself, but relates only to a particular incumbent thereof, on the termination of whose right thereto the term ends. *Clay v. Browne*, N. J., 114 Atl. 808.

51. —Zoning Ordinances.—A city, under the Home Rule Act of 1911, as amended by P. L. 1920, p. 406, may, in the exercise of its police power, enact a zoning ordinance to promote the public health, safety, and general welfare. *Cliffside Park Realty Co. v. Borough of Cliffside Park*, N. J., 114 Atl. 497.

52. Negligence—Duty to Invitee Defined.—One who invites another to come upon his premises is bound in law to see that such premises are in such condition that the invitation may be safely accepted. *Roman v. King*, Mo., 233 S. W. 161.

53. Principal and Agent—Authority of Agent.—A person dealing with one known to be an agent is held to the exercise of reasonable prudence, and, if an agent makes an agreement, representation or promise so unusual and unreasonable as to arouse the suspicion of a man of ordinary or average business prudence, he is put upon notice and must ascertain if actual authority has been conferred. *Schuster v. North American Hotel Co.*, Neb., 184 N. W. 136.

54. Railroads—Crossing.—When plaintiff was loading freight cars on a side track in the vicinity of a public crossing, and was not in the act of using the crossing, there was no duty on the part of defendant railroad company to give the usual signals of the approach of a train at the crossing. *Barbeau v. Hines*, N. Y., 189 N. Y. S. 690.

55. —Tort of Agent.—The federal Director General of Railroads in control of a railroad is not liable in punitive damages for the willful tort of his agents and servants. *Massey v. Hines*, S. C., 108 S. E. 181.

56. Sales. — "Fraudulent Representation" and "Warranty" Distinguished.—A fraudulent representation is an antecedent statement made as an inducement to the contract, but is not a part or arrangement of the contract; while to constitute an express warranty the statement must be a part of the contract. *Griswold v. Morrison*, Cal., 200 Pac. 62.

57. Sheriffs and Constables—Wrongful Seizure.—A sheriff who levies on property of a wife under an execution against her husband is liable for resulting damages. *Gilbert v. Rothe*, Neb., 184 N. W. 119.

58. Specific Performance—Time of Essence.—Time, in equity, not being generally deemed to be of the essence of a contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract equity will enforce specific performance of a contract,

though the time fixed for such performance has been suffered to pass by complaint, unless the facts show that the parties intended that such time should be of the essence of the contract. *City of Newark v. Lindsley*, N. J., 114 Atl. 794.

59. States—Immunity from Suit.—Where by its Constitution the state is immune from suits against it except as the Legislature otherwise provides, the immunity thus provided cannot be waived by a voluntary general appearance in the case and a participation in the trial thereof upon its merits by the Attorney General in an unauthorized action brought against the state. *McShane v. Murray*, Neb., 184 N. W. 147.

60. Street Railroads—Humanitarian Rule.—In an action for injuries from being run over by a street car, in which the allegations in the petition as to the failure of defendant's motor-man to stop the car, slacken its speed, and give warning were in the disjunctive, an instruction so placing them, though it left out of consideration the slackening of speed, was not error, where plaintiff submitted her case on the humanitarian rule alone; it being unnecessary that the jury find all three of the things specified in the petition. *Hill v. Kansas City Rys. Co.*, Mo., 233 S. W. 205.

61. Telegraphs and Telephones—"Interstate Commerce."—The transmission of a telegram between points in the state by a route through another state, uniformly adopted and used at the time, is "interstate commerce," governed exclusively by the federal Interstate Commerce Act, as amended by Act Cong. June 18, 1910, § 7, so that damages for mental anguish for non-delivery are not recoverable. *Western Union Telegraph Co. v. Barbour*, Ala., 89 So. 299.

62. Trade Unions—Damages for Wrongful Expulsion.—The damages recoverable against the association are such as are the direct and proximate result of the expulsion, such as the inability of the expelled member to secure employment at his trade in the locality where he was employed. *Stenzel v. Cavanaugh*, N. Y., 189 N. Y. S. 833.

63. Trusts—Resulting Trust.—Where deeds to a wife for land purchased by her husband were absolute deeds, the fact that she importuned and persuaded him to take title in her name for the benefit of herself and their heirs and children, so that in case he should become unfortunate or have judgments entered against him provision would be made for the family, did not create a resulting trust. *Gibbs v. Gibbs*, Ga., 108 S. E. 214.

64. Vendor and Purchaser—Breach of Contract.—Where defendant purchased land with knowledge that the vendor had contracted to sell to plaintiff, plaintiff's right of specific performance was not affected, and he had no right of action against defendant for inducing the vendor to break his contract and sell the land to him. *Sonnenberg v. Hajek*, Tex., 233 S. W. 563.

65. War—Government Contract.—Though a contract by a wool dealer, whereby he agreed to the limitation of profits fixed by regulations of the War Industries Board, was entered into under stress of war conditions, such conditions do not avoid the contract, or excuse failure to perform it where it is not known that there was either coercion or duress. *United States v. Powers*, U. S. D. C., 274 Fed. 131.

Central Law Journal.

St. Louis, Mo., November 25, 1921.

A UNIFORM NEGOTIABLE INSTRUMENTS LAW OF THE WORLD.

The League of Nations was requested by the International Financial Conference of Brussels to use its influence with a "view to unification of the laws of different countries, relating to Bills of Exchange."

In a recent report by J. A. Barboza Carneiro, on behalf of the League's committee, the recommendation is made that the League Council prepare a questionnaire to be forwarded to the different governments. The object of this questionnaire would be to ascertain the opinion of each government, with regard to the regulations of 1912, and its attitude towards the question of the summoning of a further conference as was formerly done, but under the auspices of the League of Nations.

There is, of course, no subject of law on which uniformity is so desirable as that of the law of negotiable instruments. It was the subject of bills and notes which first demanded the attention of our own Conference of Commissioners on Uniform State Laws. This great code agrees in most particulars, with the law of England, and might very properly become the basis for a universal code—the first of its kind in the world, if we except the *Corpus Juris*.

The great demand for uniformity of the law on this subject on the part of merchants, has been intensified by the closer intercourse and more frequent communication, among the merchants of various nations, brought about by more rapid and convenient means of travel.

There are today, three great systems of law applicable to commercial papers,

French, German and English, which constitute at the present day the most important legislation on this subject. To bring these rules into harmony is a problem, the solution of which has formed the subject of recommendations voted unanimously by several international congresses. Mention should be made in particular of the National Association for the Promotion of Social Science in 1863; the Societe de Legislation Comparee de Paris in 1869; the International Law Association in 1878, which adopted a draft scheme of unification, known by the name of "Bremen rules;" the Congress on Commercial Law, which met at Antwerp in 1885, under the patronage of the King of the Belgians; the International Commercial and Industrial Congress, which met in Paris in 1889, and adopted a draft scheme for a unified law containing 18 articles; the Congress on American Law, held at Rio de Janeiro in 1900; the Corporation des Doyens des Commerçants at Berlin, 1905; the International Congress of Chambers of Commerce, held at Liege, 1905; and at Milan, 1906; the International Law Association, at its meetings at Berlin in 1906 and at Budapest in 1908; and, finally, the International Congress of Chambers of Commerce, held at Prague in 1908, which adopted the following recommendations:

"The Congress confirms the recommendations made at the previous congresses of Liege and Milan, as regards the necessity for the unification of Bills of Exchange, and

"Requests the members of the Congress to bring pressure to bear on their respective governments to accept the proposal of the Dutch Government, with a view to summoning an international conference for the preparation of uniform legislation on the subject."

The most recent abortive effort to make a uniform code on this subject, was at a conference called by the Dutch Government at the Hague on June 15, 1912. This Conference drew up a code of 31 articles, which was signed by the repre-

sentatives of thirty-five nations. Great Britain and the United States refused to join and the code was never promulgated. The report of Carneiro's Committee, very fairly states the reasons why the two English-speaking nations did not feel justified in adopting the new code. He says:

"Although the United Kingdom and the States sent delegates to both Conferences, they did not sign the convention. It should be pointed out that at the beginning of the Conference of 1910, the representatives of those two great Powers explained that they would find it impossible to sign the agreement. This attitude is easily understood for the English law on the subject, *i. e.*, the Bills of Exchange Act of 1882, is in force, not only in Scotland and Ireland, but also in the British Colonies and Dependencies, and also in the United States, where it was adopted in 1897, in New York State and became the Negotiable Instruments Law which, except for small differences, constitutes the law on the subject in the States of the Union. There exists, therefore a unified system accepted in all the States speaking the English tongue, that is to say, in a group of States which covers an area of nearly 42,000,000 square kilometers, and possesses a population of 500,000,000. It was, therefore, difficult to persuade them to adopt new regulations which would not have been in accordance with their own legislation."

It seems to us, since Great Britain and the United States have practically the same code, and in view of the fact that more than half of the commercial paper of the world is governed by the provisions of this law, that it should be an easy task, as well as the best solution of the present difficulty, to bring the provisions of the Hague code of 1912 into harmony with the law of Great Britain and the United States. The Hague code has been adopted by only two states, Guatemala and Brazil. It would be an almost impossible task to secure the adoption of a new uniform negotiable instruments law in the United States where every state (except Georgia) has adopted the act prepared by the Conference of Commissioners on Uniform State Laws.

Moreover, this law has been tested by an experience of over twenty-five years in America and Great Britain, and has proven itself sufficient to meet all of the demands of the most complex of all commercial systems in the world.

NOTES OF IMPORTANT DECISIONS.

IS IT ARSON TO BURN ANOTHER'S HOUSE AT THE OWNER'S REQUEST—A common law arson consisted in the burning of another's house. There was no offense committed if he burned down his own house. And a recent Ohio case has just decided that this rule obtains today even though the incendiary is the agent of the owner whose desire is to collect the insurance on the building. *Haas v. State of Ohio*, 132 N. E. 158.

In this case one Cowan furnished money to one McClure to purchase and insure a house. Haas, who was the leader of the conspiracy, procured one Grogan to be the torch. Haas was indicted for arson. He was convicted and his conviction upheld by the Court of Appeals. This conviction the Supreme Court of Ohio set aside on the ground that the defendant did not set fire to the house of another and therefore could not have committed the crime of arson. He might have been liable, the Court said, with the owner under another provision of the criminal code for setting fire to one's own house to collect the insurance, but not for setting fire to another's house. Here is the argument of the Court:

"It is but the application of ordinary logic to say that if the aider and abettor of crime is guilty of the same crime as the principal, and may be prosecuted as a principal, that the principal is guilty of the same crime as the aider and abettor; that in law the action of the one is treated as the action of both and that the actions of both are no different than though the separate acts of each were performed by one person. So that the burning in this case, though accomplished by the separate acts of three or four persons, remains the same kind of offense as though it had all been accomplished by one person. In other words, if Cowan furnished the money with which to purchase the property and with which to buy the insurance, and McClure became the holder of title of record, and Haas hired Grogan, and Grogan burned the buildings, there was but one common purpose accomplished and but one crime committed, and that crime was no different by the participation of the four therein than it would have been had McClure furnished

the money with which to purchase the land, taken out the insurance, and set fire to and burned the buildings himself. In such event, McClure would have been guilty of violation of § 12434, General Code, and not of § 12433, General Code, because he would have burned his own buildings for the purpose of prejudicing the insurer, and not the buildings of another. If then McClure could not have been guilty of the violation of § 12433, General Code, had he carried out this enterprise unassisted and unaided, and if the act of each conspirator is the act of all and the acts of all are chargeable to each, it necessarily follows that the act of Haas in employing Grogan was the act of McClure, and the act of Grogan in burning the buildings was the act Haas and McClure, and that, therefore, the burning by Grogan was no more the burning by Haas than it was the burning by McClure. Each act was referable to the common purpose, and the burning in this case was not the burning of the building of another, but was the burning by McClure of his own building through the agency of Haas and through the agency of Grogan."

The argument in this case is accurate and lucid. The difficulty here is in the number of persons involved. Haas was the leader of the conspiracy and procured McClure to purchase the building. He therefore had an interest in the enterprise, and even though technically McClure may not have instructed him to burn the building his act was the act of one interested equally with the owner in the conspiracy to defraud the insurance companies. For all practical purposes Haas was the owner of the building, although technically McClure held the title. The Court, however, makes Haas the agent of McClure, which is not incorrect even if there was no express agency, for all persons involved in a conspiracy are agents of each other in carrying out the conspiracy.

A comparatively recent Missouri case supports the decision in the principal case. *State v. Greer*, 243 Mo. 599 where the Court said that "under the statute if the building is not insured and the owner burns it, or if a defendant, who has no interest either in the building or its contents, assists the owner to burn it, no crime is committed, for the burning of uninsured property becomes a crime only when done by some one other than the owner. Such burning becomes a crime only because of the intent to defraud the insurer."

See also *State v. Sarvis*, 45 S. Car., 668, 32 L. R. A. 647; *Commonwealth v. Makely*, 131 Mass. 421; *State v. Haynes*, 66 Me., 307; *Heard v. State*, 81 Ala. 55.

HOW TO GET ON AT THE BAR.*

When Erskine was making his first speech at the bar—the immortal oration in defense of Captain Bailey—it was necessary for his client's vindication to expose the conduct of the First Lord of the Admiralty, the infamous Lord Sandwich, who had so much to do with driving the American colonists into rebellion. As Erskine proceeded with his arraignment, Lord Mansfield, who was presiding, said sternly, "Lord Sandwich is not before the court"; to which Erskine replied, "No, my Lord, but I will bring him before the court"; and he proceeded with his terrible philippic. When someone asked him how he dared answer the great and austere Chief Justice in such a manner, he said, "I felt my wife and children tugging at my coat-tails, and I could not give in." And it must be confessed that it is only the hard necessity of earning our daily bread that nerves us for the trials and struggles of our profession.

This is a strictly practical discourse intended to aid our young lawyers to get on at the bar. It deals only with questions of expediency, and for that very reason it must start out with laying a strong emphasis upon the moral issue. For one young man who fails at the bar for want of ability at least two fail for want of character.

If you will look around upon the leaders of the bar of your state, you will find them all to be men of the most unquestionable integrity. You will see some younger men without principle, who appear to be successful; but sooner or later the slow-grinding mills of the gods will seize them in their remorseless jaws, and cast them forth, crushed and mangled.

The reasons for this are numerous.

In the first place, there is no business in which dishonorable conduct is so sure to

*This is a revision of a recent address by Mr. Rose before the graduating class of the Law Department of Memphis University, and is so unusual in its original suggestion that we feel that our younger readers, at least, will be glad to read it.

be discovered or so effectively denounced. There is always opposed to you a watchful adversary, who will be quick to detect any unworthy artifice, and who, being a trained speaker with a wide acquaintance, will spread broadcast a knowledge of your shame. You may at first deceive him, and get the advantage in the particular case in hand; but in the long run you will pay a penalty that will be more than a sufficient punishment for your offense.

The standing of a lawyer in the community is eventually that accorded to him by his brethren of the bar. If they speak well of him, the public learns to esteem him; if they condemn him, the public will finally see him with their eyes. No lawyer can succeed if his professional brothers unite in reprobation of his conduct; and the dishonorable lawyer is going to offend one after another of his associates until they will unite either to drive him from a calling that he disgraces, or at least to deprive him of that public confidence which is the basis of all professional success.

In another way the good will of your associates is conducive to your advancement. We are continually offered employment that we cannot accept because of conflicting engagements; and in the majority of cases the would-be client asks us whom we would recommend. It is needless to say that we will not recommend a lawyer who has got an advantage of us by means of a dishonorable trick. On the contrary, we deem it our duty or our pleasure to warn against the trickster.

It is true that the average client wants results, and cares very little how they are brought about. He will, without compunction, accept the fruits of a lawyer's rascality; but when it comes to employing counsel in another case, he will be very apt to say to himself, "It is true that that shyster got my money by that cunning trick; but how do I know that I shall not be his next victim? When I employ him as my lawyer, I put myself wholly at his mercy. If he will trick one person, he will trick another;

and how am I to be sure that he will not sell me out?" And so the client is driven in self-defense to employ a lawyer on whose absolute integrity he can rely. Would any man who has won a horse-race by bribing his opponent's jockey, ever permit that jockey to ride his own horse? Those who have suffered by unprofessional conduct will denounce it bitterly, and even those who have profited by it will no longer dare to trust the offender.

Quintillian truly says that the first requisite of an orator is integrity. There is in the blundering speech of an honest man more power of conviction than in a knave's most honeyed accents. What we seek in every judicial investigation is truth; and the voice of the man whom we believe to be a knave falls upon our ears like tinkling cymbals which may entertain and amuse, but which cannot convince. What carries conviction is moral earnestness. We must be sure that the speaker is honest, or we close our hearts and minds to his insidious pleading. If we know that his integrity is incorruptible and that his judgment is sound, the contest is almost won. Lord Bryce is a prosy speaker; yet when he was in the House of Commons, even Mr. Gladstone, with all his amazing eloquence, could scarcely fill the hall as he; for the members knew that when Bryce spoke they would get the truth. However deficient he may be in the graces of oratory, the man who acquires at the bar the standing that Lord Bryce had in Parliament will be a mighty force.

These days the largest fees are not earned in litigation, but by guiding great financial enterprises in the conduct of their business. The lawyers who enjoy the largest emoluments rarely appear in court. It is apparent that only a man of the most unquestioned honesty can be entrusted with a knowledge of these vast operations, where a word slipped to a rival would bring down everything in clattering ruin. The dishonest lawyer will wait in vain for such employment.

In fact, at the bar as everywhere else, we are compelled to recognize that the greatest of all the forces in the conduct of human affairs are the moral forces. Occasionally in the business world we see a pirate who by audacity and cunning acquires a large fortune despite the reprobation of his fellow-men; but the great majority of successes in business are due to honest toil. And the triumph of these pirates offers no encouragement to the piratical lawyer. They are working for themselves; he must work for others. Their capital is their craft and boldness; his capital is the confidence of his clients. Deprive him of that, and all his opportunities are lost. And he who does not deserve our trust can rarely acquire it.

A man does not have to be brilliant to succeed at the bar; but he must have a clear strong, logical mind. Unhappily, there is no way to find out whether one has such a mind save by experience; and the young lawyer too often does not discover that he is not qualified for the law until it is too late for him to succeed in any other pursuit. The trouble is that we have only our own minds to judge by; and we can no more judge ourselves correctly than we can weigh ourselves by pulling on our bootstraps. By a kind dispensation of nature, we usually overestimate our abilities, reveling in a fool's paradise of self-satisfaction. Nor can we even depend on the judgment of others. Some of the strongest and most successful lawyers that I have known were laughed at when they took up the study of the law; and how many bright young men, of whom great things were expected, have I seen descend year by year into utter failure!

Yet, while intelligence is a heaven-sent gift, it is largely in our power to augment or to waste it. The strength of the mind is fully as dependent on constant exercise as that of the body. If a man uses his mind actively, it will continue vigorous to a great old age, as in the case of Gladstone and Bismarck, and it will grow stronger

almost to the end; while if it is not used, it soon atrophies, as we see so often in farmers, who at sixty frequently show signs of senile dementia.

It is well for the lawyer to have a wide outlook on the entire field of jurisprudence. We can rarely judge of one thing save by comparison with others. Goethe well says that he who knows one language knows none. It is only by studying other languages that we can understand our own. The narrowing effect of confining one's self too much in the study of the law, is illustrated by Blackstone. Nothing could have been much more barbaric than the laws of England in his day. Almost every rule governing property rights was purely artificial, with no regard to the eternal principles of natural justice, while more than a hundred and fifty offenses, many of them almost trivial, were punishable with death. Yet Blackstone complacently announces that the monstrous system of laws, which he set forth in such choice language, is the perfection of reason; and if it had not been for the labors of philosophic jurists, like Beccaria and Bentham, we should still be blundering on in mediaeval darkness.

But while comparative jurisprudence is a noble study, it is not the subject of this discourse. I am discussing the question, how to get on the bar; and for that the only thing that the young lawyer needs to master is the law that he is to administer. For the winning of a lawsuit a decision of one's own Supreme Court exactly in point is worth more than all the opinions of the greatest jurisconsults. Therefore, if the young lawyer wishes to succeed at the bar, let the statutes and decisions of his own State be the principal subject of his study. If he will search his reports with sufficient care, he will find in nine-tenths of his cases a decision in point; and this will not be merely persuasive, like the works of the text-writers or the opinions of other courts, but it will be conclusive. I wish to impress this truth because in my own youth I erred

so much the other way. When I wanted to find the law, I went to the treatises and general digests, and after I had wandered far afield, and piled up many authorities, I ran by chance upon a case in the Arkansas Reports that settled the question. Therefore, it is well to bear this in mind: Unless the question be a Federal one, or the lawyer is in the United States Court and it is a question of general law, he should not look elsewhere until he has exhausted the decisions of his own Supreme Court. If they are favorable, his suit is won; if they are adverse, he had better know it in time to avoid the humiliation of an exposure of his ignorance in open court, when it will be too late to win on some other ground.

Next after the decisions of one's own Supreme Court, the lawyer's attention should be devoted to the Reports of the Supreme Court of the United States. That great tribunal is the final arbiter in a vast number of controversies, and in those where its decisions are only persuasive, they carry a weight possessed by the opinions of no other court. And it is amazing how many questions it has decided. If he is sufficiently familiar with its Reports, he can find in them a solution to almost every problem.

Aside from the Supreme Court of the United States the greatest courts in the world are those of England. The high salaries paid, ranging from twenty-five to fifty thousand dollars, the life tenure, the great respect accorded the judges, the title of nobility and the seat in the House of Lords that go with the higher judicial positions, are tempting to the leaders of the bar, so that the ablest of Great Britain's lawyers find a seat upon the bench. Consequently the English Reports are an inexhaustible mine for the student of the science of jurisprudence. But the development of England and America has been upon lines so different that the English decisions are now rarely cited by our courts, and they become each year of less practical value in the winning of cases.

I think the lawyer will find it a wise rule to read nothing but law during office hours. He should get up soon enough to read his morning paper before leaving home, and his afternoon paper can wait till the day's work is done. The reading of newspapers, magazines and novels, even histories and serious works of literature, distracts one's mind from business, and makes a bad impression on the public. The practice of the law is a very serious occupation, involving the fortunes and sometimes the lives or liberty of our clients, and we should pursue it seriously. If during office hours you have no business to attend to, take up some law book, and try to increase your knowledge of the law. The young lawyer is apt to have a great deal of time during office hours that he can devote to study; and his future is going to depend on how he employs those hours. If he will devote them to the study of law there is slight probability of his ultimate failure.

I think that the young lawyer will find it wise to keep his professional life as distinct from his personal life as possible. During office hours he should be a lawyer, and nothing but a lawyer; and if his hours are of proper length, say from eight-thirty to five-thirty, with a reasonable intermission for lunch, he will find them long enough, ordinarily, for his legal occupations. When the lawyer closes his office door, he should try to think of something else. A lawyer who talks shop all the time is a bore, and not only wearies others, but himself. The best way to rest is a change of occupation and thought.

Every young lawyer should form an association of some kind. If he can form an alliance with an older lawyer, that will be best; for the experience of his senior will save him from many a humiliating blunder. If he cannot form an association with an established lawyer, then select some honest, diligent, intelligent young lawyer like yourself, and enter into a partnership with him. The advantages of so doing are manifold. If an intending client goes to the office of

a young lawyer and does not find him, he is likely to go a second time. To no business is Franklin's motto, "Keep your shop, and your shop will keep you," more applicable. But a lawyer must often be out of his office if he has any business. If, however, there are two or more in partnership, it can nearly always be arranged to have one in the office during office hours.

Then the advantage of having someone with whom to talk over one's cases and who will take a serious interest in them is enormous. To discuss one's cases with a mere acquaintance at the bar will do little good. He will take only a perfunctory interest, while a partner will enter into the matter with all his heart; and one will be surprised to find how much light the discussion will throw upon the subject, how many ideas that would not spontaneously have occurred to either partner will be thus evolved. There are no means of reaching a correct conclusion that can be compared with an oral argument; and if one has a partner, that argument can be had before he enter the court room, so that he will go into court thoroughly equipped, and the danger of a surprise will be reduced to a minimum.

As the world becomes more civilized, the lawyer is more often employed to keep his clients out of litigation rather than to conduct their law-suits. The great leaders of the New York bar rarely appear in court. Their vast learning and their far-sighted wisdom are employed in guiding the prodigious financial operations of the metropolis. From the very beginning every lawyer's business will be somewhat along the same line. He will be called upon to prepare contracts. It is easy to prepare a contract so that it will stand. But to prepare a contract with a foresight as to all its possible consequences, so as to guard one's client's rights in every contingency, is a thing that demands deep thought and keenest foresight; and, to be a truly successful lawyer, you must do this. If, when a contract has been prepared, a contingency

arises, which was not foreseen, and not guarded against, the chances are that the lawyer who prepared the contract has lost a client. But it is hard for one to look at the papers that he has prepared with the necessary aloofness. He knows what is in his own mind, and looking at the paper from that side only, it seems perfect; but a partner, looking at it without a bias, will see that it might receive a very different interpretation, and he may foresee dangers that you have overlooked.

I consider the advantage of consultation so great that I shall here explain the system worked out in the writer's own office after years of experience. We have a room set apart for firm consultations. Here we have the Reports of the Supreme Court of Arkansas, and of the Supreme Court of the United States, the State and Federal Statutes, the encyclopedias of the law, in short, the indispensable tools of the trade. In this room there is a large table, like a directors' table. We have a portable sign marked "Consultation," and at exactly nine o'clock every morning one of the girls in the office presents it to every member. We then gather in the consultation room, and each member in rotation lays before us the matters on which he wishes our advice. In this way, upon every question that arises, whether of law or fact, we get the advantage of the knowledge possessed by all and the ideas that spring from a meeting of minds. I consider this one of the most important things in the course of our practice; and the quicker a law firm puts into operation a system somewhat analogous, the better it will be for their clients.

There is another advantage about a partnership: People who are sending business from out of town are more apt to send it to a firm; because they realize the danger, in case they send it to a lawyer practicing alone, that he may be sick or absent. And even at home when a young lawyer is in partnership, it looks more as if he had business than when he stands by himself.

The young lawyer should be neat and conventional in his dress. That is not so important now as in the days when Polonius advised, "Costly thy habit as thy purse can buy;" but still it is not to be neglected. Nothing succeeds like success, and the man who is ill-dressed wears the garb of failure. If one is going to get on at the bar, he must receive the support of the well-to-do. A few lawyers can subsist on damage suits brought by injured laborers, but only a few; and even the laboring classes prefer a lawyer who dresses like a gentleman. Well-to-do people generally dress well, and they are indisposed to employ a man in a professional capacity who is slovenly in his dress. In fact, until a lawyer has attained to great eminence, those who employ him are usually men with whom he has social relations; and it is hard for an ill-dressed lawyer to form social relations with the well-to-do.

Politeness is an invaluable asset for every man, and for none more so than a lawyer. If he will look around at the leaders of his bar, he will usually find them gentlemen of the greatest courtesy. There are a few successful lawyers who are lacking in urbanity; but they are strong men who have won the race despite a heavy handicap; and without this burden their success would have been far greater.

A man cannot succeed at the bar without clients; courtesy attracts clients; rudeness repels them. And because politeness is such an assistance in getting on in the world, the men who control the big business of the country are usually polite men. Such men are not going to give their patronage to one whose manners they find offensive. The old Latin maxim, *Fortiter in re, suaviter in modo*, is still the essence of wisdom.

A lawyer's advancement will ultimately depend on the record of his success in handling his cases. I have known a few very rude men who by their innate force of mind and character were successful at the bar; but I have also observed that after some

years their star declined. They had made so many enemies that their path was continually obstructed. Every court had a grudge against them; on every jury there was at least one man determined that they should not have a verdict. The polite lawyer wins clients; the courts listen to him with benevolence; on every jury he has a friend. And the young lawyer should be polite to his brethren of the bar. As I have said, it is they who eventually determine his professional standing, and it is in their power to throw to him an immense amount of business, or to divert it from his door.

I have known a few rude, powerful lawyers who on cross examination achieved conspicuous results by intimidation. But they are the exception. It is the courteous lawyer, who leads the witness gently on from one admission to another that catches the rascal in the trap. When he has caught the witness, the lawyer can show his righteous indignation with telling effect; but if he lets it bubble forth too soon, the witness is put on his guard and all is lost. The greatest of all cross examiners was Socrates. He who wishes to master the art of cross examination should study the dialogues of Plato, and see with what almost superhuman skill and with what perfect urbanity Socrates leads his opponent on into admissions, at first apparently trivial, until the unhappy man is completely wound up, and forced to acknowledge his defeat.

In the hands of an artist, cross examination is a powerful means of eliciting the truth; but, in the majority of cases it does more harm than good. The cross examiner merely takes the witness over the same ground in a louder and often menacing voice, with the result that the witness only repeats his story in a more emphatic manner and frequently with damaging additions.

My father told me of an amusing case that he witnessed in the mountains of Arkansas. A young man was on trial for mayhem in biting off an ear. The prosecuting attorney, a notoriously inefficient man,

put on the stand the only witness of the crime, and inquired, "Did you see the fight between the defendant and Bill Smith?" "Yes." "Did you see the defendant bite off Bill Smith's ear?" "No; I didn't see him bite off Bill's ear." As there was no other witness, the case was won for the defendant; but the counsel of that unhappy wight, who was even more incompetent than the prosecuting attorney, wanted to do something to prove his skill, and inquired, "Did you see anything that looked like the defendant bit off Bill Smith's ear?" To which the witness replied, "No; 'cept when he got up off of Bill he spit out an ear; but I don't know whose ear it was."

But, fundamentally, the success of all cross examination, and, indeed, of all action at the bar, is an accurate knowledge of the minutest details of one's case. Unless the lawyer knows the facts in all their minutiae, he cannot entrap a dishonest witness by leading him into statements which he can demonstrate to be untrue; and his argument will carry no conviction unless he can point to the concrete facts on which it is based. Mere glittering generalities rarely persuade; and if, in ignorance of the facts, the lawyer makes statements which he is compelled to retract, the effect is always unfortunate. Therefore, before going into a trial or beginning the taking of depositions one should talk the case over with his client and his witnesses in the fullest detail.

A great factor in a lawyer's success is tact. This means an instinctive comprehension of human nature and skill in approach along the lines of least resistance. It is a natural gift; but like all natural gifts it can be cultivated or allowed to perish for want of exercise. The lawyer who understands courts, juries and witnesses and approaches them in such a manner that his point of view seems their own is almost sure to triumph over the blunderer, however strong, who tries to force his way; just as the man of ordinary strength who climbs a mountain by the easiest route, will reach the summit while his stronger rival who blunders against its precipices will fail

to reach the goal. Therefore, every lawyer should try to understand the characters of those with whom he has to deal, and approach his subject in the way most acceptable to them.

Young lawyers are apt to be too pugnacious in argument, and I commend to your attention the following passage from the Autobiography of Benjamin Franklin.

"I made it a rule to forbear all direct contradiction to the sentiments of others and all positive assertion of my own. I even forbid myself, agreeably to the old laws of our Junto, the use of every word or expression in the language that imported a fixed opinion; such as *certainly*, *undoubtedly*, etc., and I adopted instead of them, *I conceive*, *I comprehend*, or *I imagine*, a thing to be so or so; or it so *appears to me at present*. When another asserted something that I thought an error, I denied myself the pleasure of contradicting him abruptly, and of showing immediately some absurdity in his proposition; and in answering I began by observing that in certain cases or circumstances his opinion would be right, but in the present case there *appeared* or *seemed to me* some differences, etc. I soon found the advantage of this change in my manners; the conversations engaged in went on more pleasantly. The modest way in which I proposed my opinions procured them a readier reception and less contradiction; I had less mortification when I was found to be in the wrong; and I more easily prevailed with others to give up their mistakes and join with me when I happened to be in the right.

"And this mode, which I at first put on with some violence to natural inclination, became at length easy, and so habitual to me that perhaps for the last fifty years no one has ever heard a dogmatical expression escape me. And to this habit (after my character of integrity) I think it principally owing that I had early so much weight with my fellow-citizens when I proposed new institutions or alterations in the old; and so much influence in public councils when I became a member; for I was but a bad speaker, never eloquent, subject to much hesitation in my choice of words, hardly correct in language, and yet I generally carried my point."

To succeed at the bar you must be diligent in your business. Whatever your hand

finds to do, do it with your might. And do not procrastinate. Let your motto be, "Do it now." It is just as easy to do it today as tomorrow, and far more satisfactory to your client. Machiavelli well says that he who acts tardily usually acts hastily, endeavoring to make up by hurry of action for slowness of deliberation. Do it promptly, while the matter is fresh in your mind, but not hurriedly, taking the time to consider the remotest consequences of every act.

One of the commonest ways in which lawyers lose the favor of their clients is by failing to answer letters. Every letter should be answered on the day when it is received, or at latest, on the next day. If you cannot reply fully you can at least acknowledge receipt, and indicate when you expect to be able to answer at greater length. If a lawyer to whom business is sent does not answer his letters promptly he may be sure that he will get no more business from that client.

I strongly advise you to get to your office early in the morning. The law is a business like any other, and a lawyer's office should be as systematic as a bank. You should keep substantially the same hours as the business men whose affairs you handle. If a business man comes to your office, and finds that you have not yet come down, it makes a bad impression, and he is not likely to come again. I observe that the lawyers who are at their desks early in the morning are the diligent ones who wear through the day. I have never known a young lawyer to succeed who made a practice of coming to his office only when other business men had been at work for a considerable time.

Forensic talent accomplishes wonders at times; but it will be found that the majority of cases are not won by skillful handling in court, but by careful preparation. The man who goes into court with an accurate knowledge of the law and facts and with a well thought-out plan of campaign is almost certain to get the advantage of the brilliant but unprepared advocate. And you

would be astonished to find out how much painful preparation lies behind the apparently extemporaneous sallies of the most skillful trial-lawyers. Effects which seem to be instantaneous scintillations of genius are often most carefully pre-arranged. And be assured of this: There is no position more painful and humiliating than to be caught unprepared in court. Nor is there often an excuse for such a thing. A lawyer should know the facts and the law of his case pretty thoroughly before he brings suit or files the defendant's plea; and before the trial he should go over the matter in the fullest detail with his client and his witnesses, so as to know whether they are telling the truth, and to get at the real truth in case of a discrepancy between them; and being sure of the ultimate facts on which he can afford to plant himself, he should make a careful examination of the authorities, and lay out a consistent plan of action.

Few lawyers pay enough attention to the statutes. They are the driest possible reading; yet when they speak, they speak with conclusive authority save in the exceptional cases where they conflict with the Constitution. When a lawyer has a question, his first search should be to ascertain whether there is a statute, State or Federal, upon the subject. If there is, the chances are that he will have to look no further. And this admonition should be borne in mind, never, under any circumstance to depend on one's recollection of the terms of a statute, but to read it over carefully every time he comes to apply it. A statute is like a mountain; it always looks different according to the side from which you approach it. The great Lord Coke said: "If you ask me a question on the common law, I should be ashamed not to answer you without looking at the book; but if you ask me a question about a statute, I should be ashamed to answer you without looking at the book." It is certain that none of us will ever attain Lord Coke's encyclopaedic knowledge of the common law; and, indeed, with the growing complexity of civilization

and the infinite multiplication of law books, this is no longer possible for the human mind; but the necessity of looking at the statute each time is just as great now as it was then.

Nearly all young lawyers waste a great deal of labor by rushing to the lawbooks before they have thoroughly mastered the facts of the case, so as to know the precise issues that are going to be involved. I was myself a great sinner in that way until I read this anecdote of Sir Richard Webster, the leader of the London bar until he became Lord Chief Justice of England. Someone asked him to what he attributed his great success, and he replied, "I attribute it to the rule that I have always adhered to, to be sure of the facts before looking up the law." That sentence came to me as a great light, and I advise every young lawyer to paste it up where he can see it frequently.

Another saying of the same great advocate has been of much help to me, and I believe that it will be equally helpful to others. He was asked to what he attributed the marvelous lucidity of his statements of facts, and he replied that he attributed it to the fact that he made it a rule always to adhere to the chronological order. Horace says that the poet should begin *in medias res*; and that, I think, is true; but after much experience and many experiments, I have found that Sir Richard is right, and that the chronological order brings a greater lucidity than any other.

Every lawyer should keep a commonplace book, carefully indexed, where he will note down statutes and decisions that seem to him especially important. At first everything will be novel, and he will note down much that he will find later to be the mere truisms of the law. So after he has practiced for some years and has become well grounded in the fundamental principles, he should start a new book, into which he should transfer only so much of the first book as it still remains important for him to remember, and in which he should con-

tinue a more discriminating system of annotation. In this book he should study the art of compression, condensing the essence of the decisions into the fewest possible words; and this book he should read over at frequent intervals.

In conclusion, let me say that there are two main classes of lawyers, the lawyers who impede business and the lawyers who facilitate it. The first kind see only the difficulties. No matter what their client wants to do, they see impediments in the way. Such men are very safe, but neither they nor their clients make much money. The other kind of lawyers are the men who are ingenious and resourceful in devising means of carrying out their client's plans. Of course, if what the client wishes to do is morally wrong, an honest lawyer can lend no aid to its accomplishment. But in the great majority of cases the end sought is proper enough, only in his ignorance the client has blundered into a violation of some rule of positive law in his plan for reaching it; and in such cases it is the business of the lawyer to avoid the rocks and shoals, and pilot his client's bark to safety. Such are the eminent lawyers under whose guidance the great affairs of our country are conducted.

GEORGE B. ROSE.

Little Rock, Ark.

MUNICIPAL CORPORATIONS—POWER TO REGULATE AUTOMOBILES FOR HIRE.

STATE ex rel. STEPHENSON v. DILLON,
Chief of Police.

89 So. 558.

Supreme Court of Florida, Aug. 15. 1921.

(Syllabus by the Court.)

Under the provisions of its charter, the city of Miami has the right to require the drivers of all automobiles for hire using the public streets of the city, to obtain a license from the city, and, in the interest of public safety, it may inquire into and decide upon the qualifications and fitness of persons to operate auto-cars. It may fix the fares to be charged for the trans-

portation of passengers or property, may require the drivers or owners of cars operating for hire within the city limits to give a bond to guarantee the payment of valid claims for injuries to persons or property, may prescribe the number of persons that may be permitted to ride at one time in any such automobile, and make reasonable rules and regulations governing the operation of automobiles for hire in the interest of public safety.

BROWNE, C. J. The plaintiff in error was held in custody by the chief of police of the city of Miami under a charge of violating an ordinance entitled "an ordinance regulating jitney busses," by operating a jitney bus without a license. He obtained a writ of habeas corpus from Court Commissioner D. J. Hefernan, who on the hearing ordered the relator discharged.

Motion was then made in the circuit court by the respondent asking the court to review, vacate, and set aside the order of the court commissioner. That motion was granted, the prisoner remanded, and writ of error was taken to this court.

The ordinance regulating jitney busses under which the prisoner was held is attacked, as not being within the scope of the authority of the city, in that it is not general and uniform in its operation; is unjustifiable, arbitrary, unreasonable, and discriminating; because the city has no power to require persons operating jitney busses to give a bond as provided by the ordinance and for other reasons.

The provisions of the charter relied upon for authority of the city to enact the ordinance complained of are:

"And to license, and cause to be registered, and control, tax and regulate carriages, omnibuses, motor busses, cars, wagons, drays, jitney busses and other vehicles, and to license, tax and register the drivers thereof and to fix the rate to be charged for the carriage of persons and property within the city and to the public works beyond the limits of said city," and "to pass all ordinances necessary to the health, convenience, comfort, and safety of the citizens."

Under these provisions the city of Miami has the right to require the drivers of all automobiles for hire using the public streets of the city, to obtain a license from the city, and in the interest of public safety, it may inquire into and decide upon the qualification and fitness of persons to operate auto cars. It may fix the fares to be charged for the transportation of passengers or property, and may require the drivers or owners of cars operating for hire within the city limits to give a bond to guarantee the payment of valid claims for injuries to persons or property, and prescribe the number of persons that may be

permitted to ride at one time in any such automobile, and make all reasonable rules and regulations governing the operation of automobiles for hire to safeguard public safety. *Hadfield v. Lundin*, 98 Wash, 657, 168 Pac. 516, L. R. A. 1918B, 909; and notes, Ann. Cas. 1918C, 942; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, P. U. R. 1915E, 93, L. R. A. 1915F, 840, and notes. These provisions, and others not enumerated, are within the scope of the authority of the city, if applied without discrimination to all automobiles operated for hire.

The right to require a bond to guarantee the payment of valid claims against the drivers of all automobiles for hire does not, however, authorize the requirement of a bond in an amount far in excess of what common experience teaches is likely to be necessary nor to impose unreasonable conditions in the bond or conditions that make it impossible for compliance with this provision of the ordinance.

The ordinance under consideration requires a bond of this character in the amount of \$5,000 and in lieu of a bond the "licensee may file as aforesaid a policy of liability insurance insuring said licensee of said jitney bus against loss by reason of injury or damage that may result to any persons or property from the use, operation, or construction of said jitney bus." The ordinance further provides:

"Said bond or policy shall contain a provision that there is a continuing liability thereunder of not less than the full amount thereof as herein provided, notwithstanding any recovery thereon."

Just what is intended by this language is not very clear. If it means that while the obligors are nominally bound for \$5,000, yet after the recovery of that amount or after liability is incurred for that amount, they shall continue to be liable without limit, to the number of occasions when liability may accrue, it is not only a nullification of the provision of the ordinance requiring that "such bond be in a sum of \$5,000," but it is unreasonable, as it requires a person desiring to operate an automobile for hire on the streets of Miami to provide sureties who will assume an indefinite and unlimited responsibility; although nominally bound for only \$5,000. This question came before the Supreme Court of Pennsylvania in the case of *Jitney Bus Ass'n of Wilkes-Barre v. City of Wilkes-Barre*, 256 Pac. 462, 100 Atl. 954. The provision in the ordinance of the city of Wilkes-Barre was in this language: "Said bond shall be a continuing liability, notwithstanding any recovery thereon." The provision of

the Miami ordinance is: "Said bond or policy shall contain a provision that there is a continuing liability thereunder of not less than the full amount thereof as herein provided, notwithstanding any recovery thereon." The similarity of these provisions makes the decision of the Supreme Court of Pennsylvania peculiarly applicable to this case. There the Court said:

"We are not quite clear as to what is meant by the requirement that 'the bond shall be a continuing liability, notwithstanding any recovery thereon.' If this provision means that, while the bond purports to be in the penal sum of \$2,500, yet, after recovery to that amount, the obligors shall continue to be liable for other and additional amounts without limit, then the requirement is clearly unreasonable. No surety could properly be asked to undertake such an indefinite and unlimited responsibility."

The marshal's return to the writ of habeas corpus is as follows:

"That he holds the said E. Stephenson in his custody by authority of sentence and judgment of the municipal court of the city of Miami, Dade County, Fla., as set forth in said petition and writ. That the ordinance under which the said petitioner was arrested, tried and convicted was a valid and constitutional exercise of the police power of the city of Miami in accordance with its charter, the laws of the state of Florida and the United States of America. That all provisions of said ordinance regulating the business of jitney busses are reasonable; that the bond is reasonable; that the obligation of said bond is a valid and legal obligation that may be lawfully incorporated in bonds; that the requirement for such bond and such regulation as described in said petition is reasonable exercise of the police power of the city of Miami under the law."

This puts in issue the validity of that portion of the ordinance requiring a bond with a continuing liability, and we have no hesitation in saying that we regard this provision as an unreasonable requirement, and not within the scope of the authority conferred by the charter. So much, therefore, of the ordinance as seeks to place upon the petitioner the obligation of complying with an arbitrary and unreasonable provision with regard to giving a bond with a continuing liability before issuing a license, is unreasonable and void, and the prisoner was improperly deprived of his liberty under the ordinance.

The judgment of the circuit court is reversed, with directions to discharge the petitioner.

NOTE.—*Power of Municipal Corporation to Require Indemnity Bond From Operator of Auto-*

mobile for Hire.—Whether or not a city is empowered to require a bond from the operator of an automobile for hire to guarantee the payment of valid claims for injuries to persons or property depends, of course, upon its charter or other grant of legislative power from the state. However, ordinances containing such a requirement have been very generally upheld. *Berry, Automobiles*, (Third Ed.) § 1532. It has been held that the power to require a bond of this character from jitney operators is incident to the power to regulate the operation of jitneys. *Willis v. Fort Smith*, 121 Ark., 606, 182 S. W. 275; *Lutz v. New Orleans*, 235 Fed. 978.

A requirement for a bond in the amount of Five Thousand (\$5,000.00) Dollars has been held not to be unreasonable. *Hazleton v. Atlanta*, 147 Ga. 207, 93 S. E. 202; *Lutz v. New Orleans*, 235 Fed. 978. A bond in the amount of Ten Thousand (\$10,000.00) Dollars was held properly required. *Ex parte Cardinal*, 170 Calif. 519, 150 Pac. 348, L. R. A. 1915F 850; *Ex parte Parr*, Tex. Cr. App. 200 S. W. 404.

For full treatment of this subject, where numerous cases are cited, see *Berry, Automobiles*. (3rd Ed.) § 1532 et seq.

CORRESPONDENCE.

REFORMING THE LAW RELATING TO THE REMOVAL OF CAUSES

Editor, Central Law Journal:

You ask me to explain the recommendation relating to the Removal of Causes to the Federal Courts made by the Committee on Jurisprudence and Law Reform at the last meeting of the American Bar Association and approved by the Association. Your correspondent, Mr. Morse has evidently overlooked the conditions of the law which led to our recommendation. This is not surprising for they are complex and to some extent, conflicting.

Article III, § 2 of the Constitution provides that the judicial power shall extend to all cases "between citizens of different states." Section 24 of the Judicial Code gives to the District Courts jurisdiction of all suits of a civil nature "between citizens of different states." The removal section of the Code, § 28, provides, "Any other suit of a civil nature at law or in equity of which the District Courts of the United States are given jurisdiction by this title and which are now pending or which may hereafter be brought in any State Court, may be removed into the District Court of the United States for the proper district, by the defendant or defendants therein, being non-residents of that State."

There are conflicting decisions in different circuits as to the meaning of the words,

"proper district" and also as to the question whether the general provision thus quoted is limited by the subsequent § 51, "Where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It often happens that a suit is brought in a State Court between citizens of different States in a county in which neither party resides. Suits also can be brought in the State Courts between parties neither of whom is a citizen of the State in the Courts of which the action was brought. When an application is made to remove such suits to the Federal Courts the question arises, which is "the proper district." The conflicting decisions in the Federal Courts on this subject are stated in the report of the American Bar Association, which has been referred to, and very fully in the article by Mr. Charles A. Boston in 88 Central Law Journal 250. In reference to these conflicting decisions the Supreme Court said in, *Matthew Addy Steamship & Commerce Corp'n.*, (p. 346 Bar Association Law Journal, July, 1921) Advance opinions, p. 598.

"The conflict of opinion in the lower courts with respect to the right of removal from a State Court of a case in which the opposing parties are citizens of different states, and neither is a resident of the state in which the case is commenced, is much to be regretted; but § 28 of the Judicial Code is controlling, and Congress alone has power to afford relief." The Act proposed by the Committee and approved by the Bar Association provides as follows:

"In all cases of removal where the defendant is not a resident of the state, district, or division of the district in which suit is brought, the District Court of the United States for the proper district shall be the one having jurisdiction in the district or division thereof where suit is brought, notwithstanding any provision of § 51 of this act."

This amendment requires the Federal Court in case of removal to disregard the limitation as to residence imposed by § 51. There is no good reason why a plaintiff who desires to oust the jurisdiction of the Federal Courts should be at liberty to bring an action against the defendant in a county in which the defendant does not reside or in a State of which neither he nor the defendant are citizens. For convenience, the plaintiff suing originally in the Federal Court is required to bring his suit in the district where one of the parties resides. But where he has availed himself of the more extended jurisdiction of the State Courts, so far as residence is concerned, he

should still be subject to the general provisions of the Constitution and of the Judicial Code as to the jurisdiction of the Federal Courts.

EVERETT P. WHEELER.

New York City.

HUMOR OF THE LAW.

He: "You women have no right to the ballot, for the simple reason that in case of war you would not be able to fight."

She: "Then why do you allow a man who is crippled to vote?"

He: "Why—er—say, if it isn't just like a woman to ask some such foolish question as that."—*Boston Transcript*.

"Prisoner at the bar," said the judge, "will you have trial by judge or jury?"

"By jury, your honor," said the defendant. "I'll take no chance on you!"

"What!" roared the court. "Do you mean to say that I would——"

"I don't mean t' say nothing," said the prisoner, stoutly, "but I ain't takin' no chances. I done some plumbin' work for you last winter!"—*Richmond Times-Dispatch*.

Small boys often ask embarrassing questions. A preacher was addressing the Sunday School and explaining the significance of white.

"Why," he asked, "does a bride desire to be clothed in white at her marriage?" As no one answered, he went on: "Because white stands for joy, and the wedding day is the most joyous occasion in a woman's life."

Immediately a little fellow piped up: "Please, sir, why do the men all wear black?"—*Boston Transcript*.

A motorist who deals in junk was before Judge Gemmill in Auto Speeders' Court, charged with reckless driving.

"Your Honor, the motorcycle cop tells a big lie, when he says I was going 30 miles an hour in my Ford," protested the accused. "Furthermore, I can prove the car can't go 30 miles an hour."

"But the policeman has sworn you were travelling 30 miles an hour," admonished Judge Gemmill.

"Listen, Judge," pleaded the defendant. "I never look at my speedometer when driving. When I go 20 miles an hour my eyes get watery, at 25 they get hazy, and at 30, why I blink so bad I can't see where I'm going. Judge, I haven't blinked in that car since I got it."—

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Agriculture—Chemical Analysis.**—Certificates of analysis of samples of fertilizer analyzed by the State Chemist, which are verified by the affidavit of the State Chemist as true and correct under the provisions of § 1271, General Statutes 1906, made for a citizen of this state of fertilizer purchased by him from any manufacturer or vendor in this state for his own use, are competent evidence in any court of law or equity in this state. *Fleischer v. Virginia-Carolina Chemical Co., Fla., 89 So. 401.*

2. **Banks and Banking—Liability of Directors.**—A stockholder's action may be maintained for the damages occasioned to a bank by the directors of the bank for negligently refusing or omitting to prosecute their predecessors in office for losses caused by the latter's negligence. *Harris v. Pearsall, N. Y., 190 N. Y. S. 61.*

3. **Bills and Notes—Failure to Present.**—Where a note payable at a bank was secured by a deposit of stock in escrow with the bank, and a collateral agreement contained no provision that the note must be kept in the bank, and the maker of the note knew that it was kept at another bank, but failed to make any tender at the bank at which it was payable, the failure of the purchaser of the note to have the note at the bank at which it was payable on the due date did not prevent suit, especially as this was not the reason for failure to pay it. *Paolella v. Brunner, Wash., 200 Pac. 481.*

4. **Uncertainty.**—A provision in a note made payable in six months for interest at 8 per cent payable semi-annually, but at 12 per cent after maturity or default, and that any interest overdue should bear interest at 12 per cent does not make such note non-negotiable on the ground that the amount due or to be paid could not be accurately determined, since there could be no uncertainty occasioned by failure to pay interest semi-annually. *Sharpe v. Schoenberger, S. D., 184 N. W. 209.*

5. **Valid Consideration.**—Forbearance or a promise to forbear suit upon a claim clearly unenforceable is no consideration sufficient to support a promissory note. *Payette Nat. Bank v. Ingard, Idaho, 200 Pac. 344.*

6. **Cancellation of Instruments.**—Laches—Laches was not imputable to one suing to set aside a deed from his grantor to a daughter, though 17 years had elapsed, where the situation of the parties was unchanged and he was at all times in the possession of the property and claimed it as his own. *Ellis v. Drake, Ala., 89 So. 388.*

7. **Carriers of Goods—Cartman** a "Common Carrier."—A public cartman, duly licensed under an ordinance of the City of New York, who had a regular stand on a city street and invited and accepted such trucking business as might be offered to him by any one who desired his services, though the bulk of his business came from certain classes of merchants in the neighborhood of his stand was a "common carrier," and under the liability of such a carrier for goods received by him for transportation. *W. N. Stevenson & Co. v. Hartman, N. Y., 132 N. E. 121.*

8. **Chattel Mortgages—Foreclosure.**—In mortgagee's action for money from sale of stamps after mortgage foreclosure thereon, the judgment in the foreclosure action adjudicating the amount due plaintiff was binding upon her and the defendant assignee for the benefit of mortgagor's creditors, and plaintiff cannot sever a claim existing at the commencement of the foreclosure action and secure relief thereon herein. *Halladay v. McGraw, N. Y., 132 N. E. 123.*

9. **Constitutional Law—Impairment of Obligation.**—Where a franchise was accepted by gas company, with a provision limiting the rates, Public Service Commissions Law, § 66, subd. 12, subsequently passed, permitting increase in rates by filing a schedule and publishing it, as ordered by the Public Service Commission, does not apply, as it would impair the obligation of the contract contained in the franchise. *Village of Warsaw v. Pavilion Natural Gas Co., N. Y., 190 N. Y. S. 79.*

10. **Contracts—Verbal Agreement.**—In the absence of statutory provision to the contrary, parties may become bound by a verbal agreement though both intend that it shall be reduced to writing and signed. *American Hawaiian S. S. Co. v. Willfuehr, U. S. D. C., 274 Fed. 214.*

11. **Corporations—Foreign Corporation.**—The pleadings and evidence showing that plaintiff was a foreign corporation, with its principal place of business without the state, and that its contract of conditional sale relied on for recovery was an Alabama contract, and failing to show that before the date of the contract it had done what under Code 1907, § 3642, and Const. 1901, § 232 it was necessary for it to do before it could do business in the state, it cannot recover. *Cable Piano Co. v. Estes, Ala., 89 So. 372.*

12. **Provisions of Statutes.**—Provisions contained and statutes are as much a part of the articles of incorporation as though they were expressly copied therein, and are to be construed together; the Constitution and statutes controlling in case of conflict with the articles of incorporation. *Weede v. Emma Copper Co., Utah, 200 Pac. 517.*

13. **Ratification.**—Where an unauthorized contract is made by a president of a private corporation with a broker for the production of a purchaser of the property of the corporation, for an agreed commission on the agreed sale price, and as a result thereof a sale is made to such purchaser so produced, and the benefits thereof accepted by the corporation, and after such sale a part of the commissions of the broker is paid by the treasurer of the corporation by direction of members of the executive committee of the directors, the contract is thereby ratified, and the corporation will be bound to perform its obligations thereunder. *McDermott v. Fairmont Gas & Light Co., W. Va., 108 S. E. 264.*

14. **Divorce—Service by Publication.**—Where a husband left the marital domicile, and in another state, on service by publication, procured a divorce for cruelty, such divorce will not where the wife is a domiciled citizen in New York, be recognized in that state, for public policy will not permit the New York courts to give effect, as against citizens of the state, of a judgment affecting marital rights so obtained on grounds which in New York are thought insufficient; but the rule is otherwise where the contest is between spouses who have never been domiciled in New York. *Ball v. Cross, N. Y., 132 N. E. 106.*

15. **Electricity—Negligence.**—A city erecting an electric light pole less than eight feet from the center line of an adjacent railroad track, in violation of the State Railroad Commission's order, is not guilty of negligence as respects the rights of a railroad brakeman injured by coming into contact with such pole while climbing the side of a moving box car which extended over the line of the street in which the pole was erected, where the railroad company employing such brakeman was so using and occupying the street without a franchise, since there cannot be neglect without the existence of a corresponding duty. *Sincerney v. City of Los Angeles, Cal.*, 200 Pac. 380.

16. **Eminent Domain.**—When "Taken."—Property which is totally destroyed or rendered valueless is "taken," within Const. art. 1, § 22, providing that private property shall not be "taken" or damaged for public use without just compensation. *Lund v. Salt Lake County, Utah*, 200 Pac. 510.

17. **Fraudulent Conveyances.**—Gift to Wife.—A husband may not, with intent to defraud his creditors, or voluntarily, give to his wife, to the prejudice of his creditors, either by assignment of a policy in his own favor or by naming her as beneficiary therein, a contract of insurance in an amount in excess of the wife's statutory exemption under Rev. Code 1919, §§ 2661, 9310, notwithstanding husband's obligation to support wife and children, and the insurable interest of the wife and children in his life, or wife's absence of knowledge of the insolvency or of the fraudulent intent of the husband; and the insurance so purchased in excess of such exemption, though standing in wife's name will be deemed a trust fund recoverable by the administrator of husband's estate for the benefit of his creditors. *Cornwell v. Surety Fund Life Co., S. D.*, 184 N. W. 211.

18. **Highways.**—Negligence.—There is no rule of law requiring one lawfully using a public highway to be constantly looking and listening to ascertain if an automobile is approaching, under the penalty, on failure to do so, of being guilty of contributory negligence if injured. *Kaufman v. Sickman, Wash.*, 200 Pac. 481.

19. **Homicide.**—Instruction to Jury.—Where a police officer, in attempting to arrest without warrant a person who is intoxicated, disorderly, loudly swearing and disturbing the peace, is shot and killed by that person, who, to excuse his act, relies on the defense of accidental discharge of the revolver in his hand caused by muscular reflex action superinduced by a blow on his cheek bone from the policeman's mace and not upon self-defense or the unlawfulness of the attempted arrest, an instruction, which tells the jury that, if they believe the attempted arrest was unlawful, then the defendant was justified in repelling it with force, and to kill the policeman if such was necessary to protect himself from death or great bodily harm, is not properly drawn, and should be refused. *State v. Long, W. Va.*, 108 S. E. 279.

20. **Insurance.**—Aeronautics.—A passenger in an airplane flying in the air, whether he takes part in the operation of the airplane or not, is "participating in aeronautics" within the intent and meaning of the provision specifically excepting such a risk from the indemnity contract contained in the policy herein. *Travelers' Ins. Co. v. Peake, Fla.*, 89 So. 418.

21. **Death by "Accidental Means."**—Where the insured in an accident insurance policy commits suicide while so insane as not to comprehend the nature of the act nor the physical result which would flow from it, his death is caused by accidental means within the meaning of the policy insuring against bodily injury from external, violent and accidental means. *Weber v. Interstate Business Men's Acc. Ass'n., N. D.*, 184 N. W. 97.

22. **Representations.**—Under § 3467, Rev. Laws 1910, statements made by the insured in his application must be construed as representations, and not warranties, and this requirement of the statute cannot be evaded by indorsing such statements upon the policy, which also contains a provision to the effect that the policy is issued in consideration of

such statements, each of which the insured, by accepting the policy, warrants to be full complete, and true. *Mutual Life Ins. Co. v. Boucner, Okla.*, 200 Pac. 534.

23. **Statutory Provision.**—A provision in a standard insurance policy provided by the laws of this state reads as follows: "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the loss occurred." Held, this constitutes a statutory limitation, and not a contractual limitation. *George v. Connecticut Fire Ins. Co. Okla.*, 200 Pac. 544.

24. **Intoxicating Liquors.**—Intent Not Element of Illegal Sale.—In a prosecution under National Prohibition Act, tit. 2, § 29, against a retail dealer for selling as a beverage cider containing one-half of 1 per cent or more of alcohol, it is not a defense that defendant bought and sold the cider as preserved sweet cider, and was ignorant that it contained more than the lawful percentage of alcohol which resulted from the ineffectiveness of the preservative used by the manufacturer. *United States v. Mathie, U. S. D. C.*, 274 Fed. 225.

25. **Prima Facie Evidence.**—Large quantities of whiskey in small containers found in the possession of any person is prima facie evidence that he has it with the intent of violating the prohibitory laws of the state. The possession itself, under such circumstances, is an overt act, and not within the rule stated in *Proctor v. State, 15 Okl. Cr.* 338, 176 Pac. 771. *Luppy v. State, Okla.*, 200 Pac. 550.

26. **Sufficiency of Proof.**—An indictment for sale of intoxicating liquor in the form of Jamaica ginger in violation of the prohibitory liquor law held sufficient to sustain a conviction for selling intoxicating liquor in the absence of a demurrer or objection in the lower court. *Cullars v. State, Okla.*, 200 Pac. 560.

27. **Sufficiency of Proof.**—In a criminal prosecution for the illegal transportation of spirituous liquor, where it is sufficiently shown that the liquor being transported is whisky, it is not necessary to show specifically that such liquor is intoxicating. *Latta v. State, Okla.*, 200 Pac. 551.

28. **Landlord and Tenant.**—Crops.—Where tenants agreed to cultivate part of the land and plant it to rice, the lease being for the crop season of 1919, commencing January 4, action for the tenant's breach brought July 5, 1919, a date which is, as a matter of common knowledge, far beyond the time for seasonal planting of either rice or oats, did not effect a premature bringing of the action. *Meer v. Cerati, Cal.*, 200 Pac. 501.

29. **Requirement of Lease Waived.**—Requirement of lease that rent be mailed to lessor was waived where lessor continuously went to lessee's place of business and there collected the rent, without making the slightest complaint of lessee's failure to mail the rent promptly when due. *Lombardo v. Clifford Bros. Co., Md.*, 114 Atl. 849.

30. **Life Estates.**—Tax Sale.—The successor of the life tenant occupied a fiduciary relation to the remaindermen in purchasing the land at a tax sale, and was bound to exercise every reasonable precaution to preserve the property intact for transmission at the termination of the life estate, and not only him, but all who took title from him with notice of his violation of trust, were trustees *ex maleficio* for the remaindermen. *Mathews v. O'Donnell, Mo.*, 233 S. W. 451.

31. **Master and Servant.**—Course of Employment.—A garage employee repairing tires when struck by a bullet from employer's gun intended for a stranger with whom the employer had a controversy over the purchase of gasoline, resulting in the shooting by the employer to defend his business, held to have sustained an injury "arising out of and in the course of the employment," within Workmen's Compensation, Insurance and Safety Act of 1917, § 6 (a), in view of § 69 (a), though the accident was un-

usual, and was not anticipated nor peculiar to the employment. *General Accident, Fire & Life Assur. Corporation v. Industrial Accident Commission, Cal.*, 200 Pac. 419.

32.—**Course of Employment.**—Where claimant was injured in the scuffle with a subforeman who was acting outside his authority in attempting to discharge claimant, the injury did not arise out of the employment, so as to warrant an award of compensation. *City of Pasadena v. Industrial Accident Commission, Cal.*, 200 Pac. 370.

33.—**Infant Employee.**—In view of the general policy of the law, since the enactment of the first Workmen's Compensation Law, and more particularly the statute enacted after an amendment of Const. art. 1, § 19, an employer, who in compliance with Workmen's Compensation Law, § 10, secured compensation to his employees, thus bringing himself within § 11, declaring that the liability should be exclusive of any other liability, is not subject to action by an infant employee, who by misrepresenting his age secured employment and was placed at operating a metal stamping machine in violation of Labor Law, § 93, and this is so although the infant was employed without the certificate required by the labor law, for in any event the relation of employer and employee existed within the spirit and letter of the Workmen's Compensation Law. *Norse v. William Vogel & Bros. N. Y.*, 132 N. E. 102.

34.—**Interstate Commerce.**—A railroad switchman who was killed while attempting to cut a crippled car from a train destined for an interstate trip, though such car was not destined for a point outside the state, was engaged in interstate commerce at the time of his death, within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), which covers the liability of a railroad company to employees injured while breaking up trains containing interstate traffic in railroad yards; transportation and interstate commerce including switching movements as well as main line traffic. *Midwest Nat. Bank & Trust Co. v. Davis Mo.*, 233 S. W. 406.

35.—**"Scaffold."**—Floor planks laid temporarily on crossbeams of a railroad's coal trestle under erection held a "scaffold" within Labor Law, § 18. *Ross v. Delaware, L. & W. R. Co. N. Y.*, 132 N. E. 108.

36.—**Monopolies.**—Exclusive Provision of Contracts.—Clayton Act, § 11, conferring authority to enforce compliance with certain sections, including § 3, on the Interstate Commerce Commission "where applicable to common carriers," gives exclusive jurisdiction to the Interstate Commerce Commission where the facts involve common carriers or the business of common carriers, and the Federal Trade Commission is therefore without jurisdiction to require a car company to cease and desist from using or enforcing a provision in contracts with railroad companies requiring them to take all their refrigerator cars for a fruit crop from it. *Fruit Growers' Express Inc. v. Federal Trade Comm'n. U. S. C. C. A.*, 274 Fed. 205.

37.—**Municipal Corporations.**—Annexation.—The plenary power of the Legislature to extend the boundaries of cities was by the Home Rule Amendment (Const. art. 11, § 5) taken from the Legislature and conferred on cities of over 5,000 population, except that in making changes such cities are limited to the procedure prescribed by the Enabling Act. *Steinhagan v. Eastham, Tex.*, 233 S. W. 660.

38.—**Collision.**—Where a defendant was proceeding in an automobile onto a driveway belonging to a railroad company, and used generally by the public, he was required to take the precautions prescribed by General Highway Traffic Law, § 11, subd. 2, § 12, subds. 4 and 6, and Highway Law, § 286 subd. 9, relating to the duty of drivers at intersecting streets; hence plaintiff, operating a motorcycle, and who saw defendants approach on an intersecting street, etc., cannot be held guilty of contributory negligence as a matter of law in assuming that defendant would not run across his path without giving him some notice or signal, and his failure to keep watch on defendant's car cannot be deemed negligence as

a matter of law. *Grulich v. Paine N. Y.*, 132 N. E. 100.

39.—**Obstruction of Street.**—The law authorizes the use of a street to a necessary and reasonable extent for the moving and placing of material to be used in an adjoining improvement. *Shafir v. Sieben, Mo.*, 253 S. W. 419.

40.—**Negligence.**—Attraction Nuisance.—In an action for the death of a child resulting from the cave-in of an embankment over a cut-out in a sand pit, where the evidence failed to show that the cut-out was made by defendant owner of the pit or any one acting directly for him, that he had actual knowledge of the bank having been left in an unsafe condition by a stranger, or that such condition existed so long as to impute notice to him, or that he was bound at his peril to discover such condition and remedy it, plaintiff cannot recover; the mere fact that defendant was the owner of the premises being insufficient. *Kotowski v. Taylor, Del.*, 114 Atl. 861.

41.—**Duty to Children.**—An owner of land, who places dangerous articles or structures upon his own premises, so situated that children of tender years, unconscious of danger, may be led by childish curiosity and impulse to enter upon such premises, owes to such children the duty to take such precautions as may be reasonable under the particular circumstances to avoid the danger to them which he knows, or may be reasonably expected to know. *Baxter v. Park S. D.*, 184 N. W. 198.

42.—**Imputable.**—Where plaintiff, a boy 12 years old, in possession of his father's bicycle, with the privilege of using it, sat on the crossbar of the bicycle which was steered by a companion while they were going for newspapers to be delivered on the companion's route, with the understanding that plaintiff was to substitute in case of sickness, plaintiff was chargeable with the negligence of his companion while coasting down a hill in the path of defendant's automobile crossing the street. *Masterson v. Leonard, Wash.*, 200 Pac. 320.

43.—**Parent and Child.**—Duty to Child.—A father's financial inability to support his young children, if the result of physical inability to work, he being without property, is a lawful excuse for his nonsupport of them; but, if he is physically able to work, he must seek such employment as he can procure, though different from his usual occupation. *State v. Nelson Del.*, 114 Atl. 863.

44.—**Physicians and Surgeons.**—Degree of Care.—In action to recover damages because of alleged negligent attempt of dentist to extract wisdom tooth, breaking the jaw, it was necessary for the plaintiff to establish that the dentist was negligent; that is, that he failed to exercise that degree of care that an ordinarily careful, skillful, and prudent operator in the locality in question would have used. *Van Epps v. McKenny, N. Y.*, 189 N. Y. S. 910.

45.—**Principal and Surety.**—Contribution.—Where, in an action by a surety, against a cosurety, for contribution (under a contract made and to be executed in Mississippi) the allegations of the petition are susceptible of the interpretation that plaintiff has paid the whole debt, and exception of no cause of action may properly be overruled; but where, on the trial, it appears that plaintiff has paid part of the debt and given a note for the balance, and evidence to show that the payment of such balance subsequently to the institution of the pending action, is objected to, the objection should be sustained and the action dismissed, as in case of nonsuit, since the matter should be determined with reference to the conditions of fact at the time of the filing of the exception, and plaintiff not allowed to profit by the ambiguity of his allegations. *Fox v. Corry, La.*, 89 So. 410.

46.—**Railroads.**—Crossing.—It is the duty of an automobile driver to approach a crossing at such speed that he can stop, after reaching a point where he can see an approaching train and before coming within the danger zone. *Evans v. Illinois Cent. R. Co., Mo.*, 233 S. W. 397.

47.—**Crossing.**—An automobile driver, who did not look or listen at night before crossing a switch track on which he was struck by a backing train without lights, held guilty of contributory negligence as matter of law. *Morrow v. Hines*, Mo., 233 S. W. 493.

48.—**Federal Control.**—An action for a personal injury received on a railroad while being operated by the government after promulgation of General Order No. 50, requiring such suits to be brought against the Director General cannot be maintained against the company owning the line, over its objection. *Morgan's Louisiana & Texas R. R. & S. S. Co. v. Johnson*, U. S. C. C. A., 274 Fed. 207.

49.—**Judgment Against Director-General.**—Even though the Federal Control Act permits suits to be brought against railroad corporations for injuries occasioned while they were under federal control, a judgment rendered against the Director General of Railroads in a suit in which he was made defendant, as provided by his General Order No. 50, and in which he made no objection to the maintenance of the suit against him, will not be reversed. *Crim v. Louisville & N. R. R. Co.* Ala., 89 So. 376.

50.—**Sales.**—Breach of Contract.—During the emergency of the war with Germany, when the government made contracts for uniform cloth, and requested through its proper army officers that delivery be made as speedily as possible, and that precedence be given over all civilian business, such orders came within the spirit and meaning of National Defense Act, § 120, making compliance with all such precedence orders obligatory on a contractor with the government so that the contractor to furnish uniform cloth which complied with the orders and neglected civilian business is not liable for breach of contract to civilian customers. *Mawhinney v. Millbrook Woolen Mills*, N. Y., 132 N. E. 93.

51.—**Conditional Sale.**—Where subcontractor purchased a motortruck from contractor under a conditional sale contract, and failed to pay installments, and the truck was re-taken by the seller, the seller was entitled to recover from sureties of the purchaser for the use of the truck the reasonable value of such use during the time purchaser was actually using it in the performance of the contract with the seller, and rental agreed on in the contract for sale of the truck was immaterial. *Burr v. Gardella*, Cal., 200 Pac. 493.

52.—**Uncertainty of Contract.**—Contract for sale of from 100,000 to 150,000 feet of lumber at \$30 per thousand for 8-foot, and \$35 per thousand for standard lengths, held not void for uncertainty as to the quantity and kinds of lumber contracted for; the seller having the right to select the amount of each kind of the different lengths he desires to furnish. *Fuller v. Presnell*, Mo., 233 S. W. 502.

53.—**Statutes—Exempt From Referendum.**—The phrase "except as to laws necessary for the immediate preservation of the public peace, health or safety," within Const. art. 4 § 57, exempting such laws from referendum, presupposes real or existing danger and impelling necessity, the word "preservation" presupposing a real or existing danger. "Immediate preservation" being indicative of a present impelling necessity with nothing intervening to prevent the removal of the danger, "public peace" meaning that quiet, order and freedom from disturbance guaranteed by law and laws in regard to "public safety," being allied in their application and effect to those enacted to promote the public peace, preserve order, and provide that security to the individual which comes from an observance of law, and "public health" meaning the wholesome sanitary condition of the community at large. *State v. Becker*, Mo., 233 S. W. 641.

54.—**Local Legislation.**—The fact that there is only one county in the state containing the required number of inhabitants making it amenable to a certain act does not render such act "special or local legislation," within Const. art. 4, § 23, prohibiting the enactment of special or local laws in enumerated cases. *Tichner v. City of Portland Ore.*, 200 Pac. 466.

55.—**Subrogation.**—Claim of Materialism.—Where the surety on the bond of a contractor for public work, conditioned for payment of claims for labor and material, on insolvency of the contractor paid into court the amount of the obligation on its bond, but the same was insufficient to pay material claims in full, it is not subrogated to the right to prove the amount so paid as a general claim against the insolvent estate in competition with the claims of the materialmen for the balance due them. *American Surety Co. v. Finletter*, U. S. C. C. A., 274 Fed. 152.

56.—**Taxation—Non-Resident.**—The tax imposed by Tax Law, § 351, on and with respect to the net income from every business carried on in the state by nonresidents, is not for the privilege of carrying on a business in the state, but one on the business done by a non-resident in the state, no greater than the tax imposed on the conduct of such a business by a resident, and is just and constitutional. *People v. Travis*, N. Y., 132 N. E. 109.

57.—**Transfer Tax.**—Stock of a domestic corporation pledged by nonresident decedent as collateral security for a loan held subject to transfer tax under Tax Law § 221, subd. 2, as amended by Laws 1916, c. 323, on decedent's death before redemption; for the transfer of the stock by decedent's will is the transfer of the stock itself subject to pledgee's lien, and not merely a transfer of the right to redeem these shares by payment of the debt. In *Re Hallenback's Estate*, N. Y., 132 N. E. 131.

58.—**Tenancy in Common—Subrogation.**—A tenant in common, who acquires an outstanding incumbrance against the common property, becomes subrogated to the rights of the lienholder whose claim he discharges, and may foreclose such lien in the event the other cotenants fail or refuse to contribute their proportionate part to the discharge of the common debt. *Magruder v. Johnston*, Tex., 233 S. W. 665.

59.—**Trusts—Conveyance to Daughter.**—Where a woman residing in a state distant from New York conveyed to her daughter there resident certain New York land to enable the daughter with greater convenience to market the property, the grantor at the time being advanced in years, and her daughter being a woman of more than ordinary business capacity and energy, on whose advice and promises her mother might well rely, the courts will not permit the daughter to default in her promise and refuse to do so as she had agreed to do—i. e. hold the proceeds of any sale for her mother—but will establish and enforce a trust. *Harrington v. Schiller*, N. Y., 132 N. E. 89.

60.—**Conveyance to Wife.**—Where plaintiff, a truckman, having recovered judgment against a railroad company as the result of an accident, conceived the idea that action might be brought against him for the death of a boy riding with him at the time of the accident, and so conveyed the family residence to his wife, on her oral agreement to reconvey at any time, and the wife, notwithstanding the husband thereafter improved the property, left him and without his knowledge disposed of it, court of equity, for the purpose of preventing fraud, will enforce the parol trust, despite the statute of frauds and where the sale was not to an innocent purchaser, will decree a reconveyance and cancellation of purchase-money mortgage. *Tiedemann v. Tiedemann*, N. Y., 189 N. Y. S. 931.

61.—**Trustee as Beneficiary.**—Where the trustee is made beneficiary of the same estate, both in respect to its quality and quantity, the inevitable result is that the equitable is merged in the legal estate, and the latter alone remains. *Axtell v. Coons*, Fla., 89 So. 419.

62.—**Vendor and Purchaser—Memorandum.**—The fact that a memorandum agreement for the sale of land contained a provision for the subsequent execution of a more formal contract does not prevent the specific enforcement of the memorandum if in fact it was a complete contract between the parties. *Spielvogel v. Veit*, N. Y., 189 N. Y. S. 899.

Central Law Journal.

St. Louis, Mo., December 2, 1921.

AUTOMOBILE COLLISION INSURANCE.

Many authorities will be found in this field of the law determining when vessels are "in collision," and the holdings are far from uniform. Two extreme ones will be noted: *The Moxey*, 17 Fed. Cas. 940, and *Wright v. Brown*, 4 Ind. 95, 58 Am. Dec. 622. In the first of these cases the injury had been done to the vessel at its mooring by being violently rubbed against by another craft. In disposing of it, Judge Betts said:

"I do not think the term 'collision,' as used in the maritime law, is to be construed with the absolute strictness contended for by the claimant's counsel. An injury received by a vessel from being violently rubbed by another, or pressed by her with force against a pier or wharf, as in this case, may, I am inclined to think, be recovered for in admiralty under the general charge of collision, as well as where the injury is derived directly from the headway of a vessel under navigation, or drifted against her."

In the second of these cases a flat boat was sunk at its wharf by violent waves produced by the Steamboat "*Wisconsin*," owned by the defendants. The Court treated it as a case of collision, saying:

"We shall consider this case as one of collision between the vessels; for it must be the same thing in principle, whether the steamboat ran upon the flat boat, or forced some other object upon it, to produce the injury."

The language of the Court in *London Assurance v. Campanhia De Moagens*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113, is in consonance with the generally accepted understanding of the term. It was there said:

"As to the first, we think that the vessel was 'in collision' within the meaning of the language used in the certificate which represented and took the place of the policy. It was not necessary that the vessel should itself be in motion at the time of the collision. If while anchored in the harbor

a vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchor and the other was in motion. We see no distinction, so far as this question is concerned, between a vessel at anchor and one at the wharf fully loaded and in entire readiness to proceed upon her voyage, with steam up and simply awaiting the regulation of some insignificant matter about the machinery before moving out. If, while so stationary (at anchor or at wharf), the vessel is run into by another, we should certainly, in the ordinary use of language, say that she had been in collision. * * *

"It is impossible, as we think, to give a certain and definite meaning to the words 'in collision,' or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision, within the meaning of this policy."

Plaintiff was insured against damage to his automobile by being in accidental collision with any other automobile, vehicle, or object. He was driving his car, and was practically stopped, preparatory to backing for the purpose of turning, when one side of the car gradually settled into the ground and the car tipped over, which caused it to be damaged in striking the ground. While the Court held that the rule *ejusdem generis* did not apply, it also held that there was no such collision as was contemplated by the policy.

"It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract. The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset or tip-over. If it were the purpose to insure against damage resulting from such an incident, why should not such words, or words of similar import, have been used? We cannot presume that the parties to the contract intended that an upset should be construed as a collision in the absence of a closer association of the two incidents in popular understanding."

Referring to the definitions of the word collision, the Court said: "Upon its face this

appears to be good logic, but the conclusion is neither convincing nor satisfying. One instinctively withholds assent to the result. 'The reason is that it makes a novel and unusual use and application of the word 'collision.' We do not speak of falling bodies as colliding with the earth. In common parlance the apple falls to the ground; it does not collide with the earth. So with all falling bodies. We speak of the descent as a fall, not a collision. In popular understanding a collision does not result, we think, from the force of gravity alone. Such an application of the term lacks the support of 'widespread and frequent usage.'" *Bell v. American Ins. Co., Wis. (1921), 181 N. W. 733.*

We quote further from the *Bell* case as follows: "For the purpose of showing a practical construction of the contract on the part of the company, the plaintiff proved by the agent who delivered the policy in question that the company provided, and sometimes used, another form covering the damage resulting from collision, which specifically excluded 'damage caused by striking any portion of the roadbed or by striking the rails or ties of street, steam, or electric railroads.' It is argued that because in some instances the company used a form specifically excluding damage caused by striking any portion of the roadbed, or by striking the rails or ties of street, steam or electric railroads, a purpose is indicated to assume responsibility by the use of the one form for damage excluded by the express terms of the other. Without stating whether, in our opinion, this testimony proves, or tends to prove, a practical construction of the contract here in question by the company, we are clear that it does not tend to prove a practical construction in harmony with that for which respondent contends. As we construe the clause quoted, it has no reference to damage caused by upsets, but it does exclude damage caused by projecting portions of the roadbed in the course of travel. It is common knowledge that an automobile traveling along a highway fre-

quently strikes an unevenness of surface in the roadbed sufficient to do damage to the automobile, and this, we think, is the damage excluded by the clause in the other form sometimes used by the company. Such circumstance was held not to constitute a collision in *Doherty v. Ins. Co., 38 Pa. Co. Ct. R. 119*, and it seems not improbable that the form exempting such liability is sometimes used by defendant to avoid such contentions as were there made. We do not think the introduction of the second form throws any light on the proper construction of the contract before us."

In a Michigan case the specific terms of the policy were not before the Court, but it appeared that there was "full coverage collision" insurance, and the sole question for the Court's decision was whether or not there had been a collision. A truck was being loaded by means of a steam shovel, and when the loaded scoop was over and above the truck, it fell from some unexplained reason upon the truck, causing damage to the truck. After reviewing a number of authorities, the Court held that the damage was caused by collision, and that the policy covered the damage.

"Most collisions occur in the violent impact of two bodies on the same plane or level, and it is undoubtedly true that the word is more frequently used to express such impacts than other violent impacts. But we doubt that this fact has given to the word such a common understanding of its meaning as to exclude violent impacts unless upon the same plane or level. If one machine was going up and another going down a steep hill, and they came violently together, no one would hesitate for a moment in using the word 'collision.' At what angle must the impact occur to make the use of the word 'collision' inappropriate and relieve the insurance company from liability? We are persuaded that the better rule, the safe rule, is to treat and consider the word as having the meaning given it uniformly by the lexicographers; that where there is a striking together a violent contact or meeting of two bodies, there is a collision between them, and that the angle from which the impact occurs is unimportant. In

the instant case there was the violent striking together of the truck and the heavily laden scoop; this was a collision within the meaning of the policy and rendered the defendant liable." *Universal Service Co. v. American Ins. Co.*, Mich. (1920), 181 N. W. 1007.

By the rule of construction known as *ejusdem generis*, general words following particular words are limited to other species of the same genus. "The particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that, if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes." 36 Cyc. 1120. It has been held that the rule does not apply where the specific words embrace all objects of their class so that the general words must bear a different meaning from the specific words or be meaningless. *United States Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69.

The Wisconsin Court, in *Wettengel v. United States Lloyds*, 157 Wis. 433, 147 N. W. 360, Am. Cas. 1915 A, 626, applied the rule in the construction of a policy insuring against damage to the automobile in question "by being in collision with any other automobile, vehicle or object." In a later case, however, the same Court held that the words of the policy come within the exception, above noted, to the rule *ejusdem generis*. In part, the Court said: "We think the reason supporting the rule also dictates the exception, and that the exception applies to the words of this policy provision. Unless the word 'object' as here used be construed as including an object of a different class, it is meaningless, as the term 'vehicle,' it seems to us, includes every species within the genus. We are disposed to construe this provision as sufficiently broad to include a collision with objects other than automobiles or vehicles, and withdraw the contrary intimation made in *Wettengel v. United States*

Lloyds, supra." *Bell v. American Ins. Co.*, Wis. (1921), 181 N. W. 733.

C. P. BERRY.

NOTES OF IMPORTANT DECISIONS.

ESTIMATING INCOME TAX ON PROFIT FROM SALE OF CORPORATE STOCK, PART OF WHICH WAS ACQUIRED AS A STOCK DIVIDEND.—The difficulty in computing the income tax on shares of stock where some of the shares were acquired by means of stock dividend, is due to the decision of the Supreme Court of the United States in *Eisner v. Macomber*, 252 U. S. 189, 40 Sup. Ct. Rep. 64, 9 A. L. R. 1570, holding that a stock dividend was not income.

The recent case of *Towne v. McElligott*, 274 Fed. Rep. 960, illustrates this difficulty. In that case it appeared that plaintiff owned shares in a corporation before March 1, 1913, and bought other shares thereafter. Later he received a stock dividend of 50 per cent upon all his shares. In 1918 he sold some of his shares, including those certificates which he had held on March 1, 1913, those which he had bought later, and some of those which he had received as a stock dividend. The tax was collected on the following basis: The plaintiff was charged with the gross sale price and credited on each share sold with the average cost of all the shares. This average for each share was computed by dividing the gross costs of all such shares by the number of the shares, including the shares declared as a stock dividend. The plaintiff argues that he should be credited with the actual cost of each certificate, computing the cost of the shares declared as a stock dividend at nothing. Thus the difference between the parties was whether, in estimating the taxpayer's credit on each share sold, the stock dividend shares should be brought into hotchpot with the shares on which the stock dividend was declared.

In holding that neither the plaintiff nor the collector had estimated the tax correctly, the Court said:

"The second point is raised by *Eisner v. Macomber*, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570, and must be ruled by its implications. Under the doctrine of that case a stock dividend is not regarded as new property at all. The old certificate represented precisely the same property as the old and new do thereafter. The old shares have proliferated, as it were, and although

the right they represented has now suffered a cellular division into smaller units of greater number, that is all that has happened. In view of this, it seems to me difficult to avoid regarding the old and new shares together as anything more than the evidence of a right which has persisted unchanged through the declaration of the dividend. It might have been possible to look at the new shares as declared from the surplus, and the surplus as not included in the old shares (at least not in the same sense as the new shares comprise it); but all such notions were expressly repudiated in the prevailing opinion. If so, each of the new shares, whether contained in the old or the new certificate, represents a part of the original property purchased and in selling the first certificate the stockholder has not sold the whole of what he originally bought, and should not be credited with the whole purchase price."

The Court then shows how such a tax should be computed. The Court said:

"An illustration will make clear what I mean. Suppose a man has certificate A, for 100 shares, bought at \$100, certificate B, for 100, bought at \$150, and certificate C, for 100, bought at \$200. Suppose, further, that a stock dividend of 50 per cent is declared, and he gets one certificate D, for 150 shares, without paying anything. If he sells certificate A, he would be deemed to sell, not the whole of his first purchase, but only two-thirds of it, and he could credit himself with only \$6,666. If he sold certificate B, he would credit himself with \$10,000, and if certificate C with \$13,333. If he sold certificate D, he could credit himself with \$15,000, made up of \$3,333 from his first purchase, \$5,000 from his second, and \$6,666 from his third. If, on the other hand, he sold only a part of certificate D, some arbitrary rule of apportionment must be adopted, allocating the shares sold among his purchases. The most natural analogy is with payment upon an open account, where the law has always allocated the earlier payments to the earlier debts, in the absence of a contrary intention. Accordingly, if all the new shares were not sold at once, I think the first sales should be attributed to the first purchases still remaining unsold when the stock dividend was declared. I do not see that this method will result in confusion in its application, and it carries into effect the underlying theory of *Eisner v. Macomber*, supra.

"The tax at bar was not computed quite in this way, because all the purchases before the declaration of the stock dividend were brought into hotch-pot. This I think was inconsistent with the theory of the identity of the shares involved in each purchase. It must, therefore, be recalculated, which the parties have kindly consented to do, if they are told the rule. The credits will be computed as follows: Upon each certificate held on March 1, 1913, two-thirds its value on that day; i. e., \$230. Upon each certificate bought at \$100, \$66%. Upon each certificate for stock dividend shares, if issued against any

specified earlier certificate, the same credit per share as the shares of that certificate. If the certificate of new shares is not so earmarked, or if but one certificate was issued for the new shares, then credit will be allowed of two-thirds the value of the shares on March 1, 1913, until half the number of shares have been sold, which the plaintiff held on March 1, 1913, and retained till the stock dividend."

WAS THE NINETEENTH AMENDMENT EVER LEGALLY RATIFIED?

That the Nineteenth Amendment, without conferring the power to grant or withhold suffrage upon the Congress, invades the "local self-government" of every state is self-evident.

It impairs the sovereignty of the people of all the states by partially depriving them of the right to decide for themselves who shall govern the state.

In the part of their constitution known as the "Bill of Rights" the people of Missouri, Rhode Island, West Virginia and Texas have forbidden their legislatures to impair their right of "local self-government" and the people of Tennessee have forbidden the members of their legislature to record the "assent of their state" to any Federal amendment proposed subsequent to their election.

The legislature of Tennessee, having been elected before the amendment was proposed by Congress, was incompetent.

The legislatures of Missouri, Rhode Island, West Virginia and Texas were also incompetent, by reason of the express provisions of the law which creates them.

When the people of all the states entered the Union they did not surrender to Congress the right to endow incompetent legislatures with "omnipotent" power simply by submitting Federal amendments to them for ratification.

The people did cede to the Congress the right to propose to their "legislatures," the very much restrained repre-

sentative bodies which "made the laws for the people," such amendments as legislatures were competent to ratify.

But by the alternative method provided in Article V for which there can be no other purpose, the people, in the same sentence reserved to themselves, acting directly in state conventions,¹ the power to ratify Federal amendments as to which the legislatures were not "competent."²

The people thus adopted the Constitution.

It was the only way they could have adopted it. For as Madison said:³ "the legislatures were incompetent to the proposed changes" * * * "it would be a novel and dangerous doctrine that a legislature could change the Constitution under which it held its existence." Mason also agreed with Madison,⁴ when he said: "The legislatures have no power to ratify it. They are the mere creatures of the state constitutions and can not be greater than their creators. * * * Whither then must we resort? To the people with whom all power remains that has not been given up in the constitutions derived from them. It was of great moment that this doctrine should be cherished as the basis of free government."

How can any one suppose that the framers, when actually in the very act of following Madison's and Mason's advice to submit the Constitution to the people themselves acting directly in state conventions, nevertheless, in the same breath, by Article V, approved the other "novel and dangerous" method and authorized it to be applied at the pleasure of Congress? If so, then the alternative pro-

vided for state conventions was totally unnecessary.

In view of this it is legally doubtful if any of the twenty-three legislatures in the male suffrage states counted as ratifying were competent to so amend the "male clauses" of their state constitutions. It is legally certain that the legislatures of Missouri, Rhode Island, West Virginia, Texas and Tennessee were not competent to ratify. All this was self-evident before *Hawke vs. Smith*.⁵ It is claimed, however, that the Supreme Court, in deciding that case, changed the source of political power in the United States from the people of the United States to Congress—turned the whole sovereignty of the people over to their creatures, the state legislatures, whenever Congress so willed. On the contrary all that *Hawke vs. Smith* decided, was that a state could not create new agencies for ratification other than those provided in Article V by making the legislature's ratification conditional on its being approved by popular vote. The legislature of Ohio was to proceed as before to ratify or reject. It was attempted, however, to add a new machinery (not contemplated by Article V) to comprise part of the act of ratification.

Article V contemplated what it says: "legislatures" restrained as they had always been by the law of their creation. It does not contemplate "legislatures plus a referendum," nor, on the other hand, "unrestrained, omnipotent" legislatures which had never before existed.

The people were certainly not giving to Congress in Article V the right to endow "incompetent" legislatures with unlimited powers to "unmake" the Constitution which they were not competent to approve. The people made the Constitution and the people alone can unmake it.⁶

(1) The only way they can act directly in their sovereign capacity, *Mc Culloch v. Maryland*, 4 Wheaton 403.

(2) Even the people thus acting directly are "incompetent" to deprive any State of its "equal suffrage in the Senate."

(3) 5 Elliott's Debates 355.

(4) 5 Ell. Deb. 352.

(5) 253 U. S. 221.

(6) *Cohens v. Virginia*, 6 Wheaton 389.

No implication can grant such power to Congress. The discretion to "propose" to legislatures does not change the term "legislature" or endow the body so named with new powers or abolish restraint inherent in the very nature of the political agent bearing that name.

It is true the legislatures derive their power to ratify, from Article V, such amendments as their people have not prohibited them from ratifying by clauses in their state constitutions. But when they come to act on a congressional proposal, each legislature speaks, not for people outside its state, but for its own state and people alone, otherwise it would record something other than "the assent of its state." In attempting to override the will of its own people incorporated by them into their organic law, it attempts to turn their refusal into an "assent."

If Congress can remove, in its discretion by proposing amendments to them, the shackles which the people of a state have imposed upon their legislature, then it is not the "assent of the state" which is recorded at all, but the unrestrained individual view of the members of its legislature perhaps elected (as thirty-four legislatures were here) before the proposal was made by Congress, perhaps called into special session (as thirty legislatures were here) and utterly lacking a popular mandate.

When the people of a state elect a legislature on other issues, do they give it blanket authority to disfranchise them, or to dilute their votes by enfranchising others, by means of any Federal amendment to that end, which may be subsequently "proposed" by Congress? The question answers itself, for in that event, the people of every state hold all their political rights at the discretion of Congress and omnipotent unrestrained legislatures.

When on the other hand the citizen votes for members of a state convention

under the alternative plan provided by Article V, newly called to act in his name upon a Federal amendment necessarily previously proposed by Congress, the issue is always direct and certain and the popular mandate complete.

The provision in the Constitution of Missouri is as follows:

"Article II, § 3. We declare that Missouri is a free and independent state, subject only to the Constitution of the United States; and as the preservation of the states and the maintenance of their governments are necessary to an indestructible Union and were intended to co-exist with it, the legislature is not authorized to adopt nor will the people of this state ever assent to any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government, belonging to the people of this state."

The provision in the Constitution of Tennessee reads:

"Article II, § 32. No convention or general assembly of this state shall act upon any amendment to the constitution of the United States proposed by Congress to the several states, unless such convention or general assembly shall have been elected after such amendment is submitted."

The Texas Bill of Rights declares:

"Article I, § 1. Texas is a free and independent state subject only to the Constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the states.

"§ 29. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government and all laws contrary thereto or to the following provisions shall be void."

As the only act of any Texas officials which could impair the right of local self-government of the state of Texas would be the action of the legislature of the state of Texas in ratifying a Federal amendment having that effect, such action is "excepted out of the general

powers of government," that is forbidden by §§ 1 and 29 of the Texas Bill of Rights.

The Rhode Island Constitution (1843) says:

"In order effectively to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare that the essential and unquestionable rights and principles hereinafter mentioned shall be established, maintained and preserved and shall be of paramount obligation in all legislative, judicial and executive proceedings.

"§ I. In the words of the father of his country, we declare 'that the basis of our political system is the right of the people to make and alter their Constitutions of government, but that the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all'."

No action of the Rhode Island legislature is "competent" to record "an explicit and authentic act of the whole people of Rhode Island," unless Congress, in defiance of the people of Rhode Island, can give it that competency, in which case it is certainly not "the free and voluntary assent of that state and her people to the Nineteenth Amendment," involving a change in the male suffrage clause of her state constitution.

Again the constitution (1872) of West Virginia says, Art. 1, § 2:

"The government of the United States is a government of enumerated powers not delegated to it, nor prohibited to the states or reserved to the states or to the people thereof.

"Among the powers so reserved to the states is the exclusive regulation of their own internal government and police and it is the high and solemn duty of the several departments of government created by this Constitution, to guard and protect the people of this state from all encroachments upon the rights so reserved."

If that is not a mandate to the legislature of West Virginia, which is certainly one of the "several departments of government" of that state, not to vote

for a Federal amendment which attacks her "internal government" by taking from her citizens in part the right to choose the voters of that state, it means nothing. In face of that mandate to the people of West Virginia can any one contend that the action of the West Virginia legislature in voting to ratify the Nineteenth Amendment, expressed the free and voluntary "assent of that State" to its enactment.

The above five states were among the "male suffrage states;" that is, each of their constitutions also contained a provision limiting their suffrage to "males." These provisions were entirely consistent with the Federal Constitution. The members of these five legislatures were all bound, by their official oaths as such, to support and defend their state constitutions. Nevertheless, a majority in each *as counted*, violated the express provisions above quoted forbidding them to ratify, and sought to amend by indirection the "male clauses."

We are dealing here not with the effect of the Nineteenth Amendment, if validly enacted, upon state constitutions, which it would, of course, supplant, but with the "competency" the "power" of "legislatures" to validly record the "assent of their states" thereto. The assent of a particular state must be the free and voluntary act of the people of that state however much it must conform to the method Article V has fixed.

The "legislature" which acts (however it derives its power), is still composed of state officials elected, organized and acting in the orderly way prescribed by the constitution of that state and necessarily subject to all the limitations prescribed therein, limiting its power to meet, prescribing the place of meeting, its dual form of organization, the procedure and all its powers. In conformity with them and not otherwise it must record the "assent or dissent of its state."

If Congress can remove all the state restrictions on its powers and make it omnipotent, then its members are not members of the state legislature at all, but Federal officials acting under a Federal power and in no sense of the word would they record the "assent of their state" to a proposed amendment. The states as such, would cease to take part in amending the Federal Constitution.

There is no such political concept in this country as the people of the United States in the aggregate. The people do not speak, never have spoken, and never can speak in their sovereign capacity, otherwise than as the people of the states. There are but two modes of expressing their sovereign will, known to the people of this country, one is by direct vote—the mode adopted by Rhode Island in 1788, when she rejected the Federal Constitution. The other is the method here generally pursued, of acting by means of conventions of delegates elected expressly as representatives of the sovereignty of the people.

Now it is not a matter of opinion or theory or speculation, but a plain undeniable historical *fact*, that there never has been any act or expression of sovereignty in either of these modes by that imaginary community "the people of the United States in the aggregate."

Usurpations of power by the *government* of the United States there may have been and may be again, but there has never been either a sovereign convention or a direct vote of the whole people of the United States in the aggregate to demonstrate its existence as a corporate unit or political sovereignty. Every exercise of sovereignty by any of the people of this country that has actually taken place has been by the people of the states as states.

No respectable authority has ever had the hardihood to deny, that, before the adoption of the Federal Constitution the

only sovereign political community was the people of each state. When the confederation was abandoned, when the Constitution was adopted by the people of the several states in their state conventions, the general government was reorganized, its structure was changed, additional powers were conferred upon it, and thereby subtracted from the powers theretofore exercised by the state governments; but the seat of sovereignty—the source of all those delegated and dependent powers—was not disturbed. The only change was in the form, structure and relation of their governmental agencies. There was a new *government*, but no new *sovereign people*" was created or constituted. The people, in whom alone sovereignty inheres, remained just as they had been before.

Madison said, in the Virginia Ratification Convention⁷:

"Who are parties to it? The people—but not the people as composing one great body, but the people as composing thirteen sovereignties."

Lee of Westmoreland said⁸:

"If there were a consolidated government, ought it not to be ratified by a majority of the people as individuals and not as states?"

Charles Pinckney in the South Carolina convention said⁹:

"With us the sovereignty of the Union is in the people." In *McCullough vs. Maryland*,¹⁰ Marshall said for the Supreme Court, page 402:

"They (the people) acted upon it in the only manner in which they can act safely, effectively and wisely on such a subject, by assembling in convention. It is true they assembled in their several states—and where else should they have assembled?"

Then, answering his own question, he conclusively disposes of any idea of a

(7) 3 Ell. Deb. 94.

(8) 3 Ell. Deb. 180.

(9) 4 Ell. Deb. 328.

(10) 4 Wheaton 316.

"mass people of the United States," in these words:

"No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states."

Of course, it may be denied that there were no such political dreamers then or are not now. But, after all these years, does any one expect a new ultimate sovereign people—a mass people of America—different from and superior to the "people of the states" who ratified the Constitution to be now discovered, or that the primary sanction upon which Marshall based the very supremacy of delegated Federal power, the action of the people of the states in ratifying the Constitution, will now be broken down? Does anyone expect that legal sanction will now sustain this effort to "break down the lines which separate the states and compound the American people into one common mass" by striking down the restrictions which the only "people of the United States" known to Marshall's court or hitherto to American history, have placed upon their agents, their "legislatures," to preserve their ultimate sovereignty and self-government?

It is with the power of the sovereign people of the United States to unmake *their* Constitution, establishing *their* Federal government which they themselves created, that we are dealing with here. The question is whether that sovereignty has now been transferred to Congress and omnipotent state legislatures specially endowed by Congress, to the extent of depriving them, the only "people of the United States" who ever existed or can exist, of their inherent rights to determine for themselves who shall exercise their sovereignty, who shall constitute their electorate; in other words, who shall govern their states and elect their Congressmen and Senators.

If their Congress and legislatures, specially endowed by Congress, determine in whole or in part the suffrage qualifications for the people, (and in doing so brush aside the restrictions the "people" in their state constitutions have placed upon them as their agents)—if these omnipotent agents, holding no popular mandate, can even disfranchise the people directly, or what is the same thing indirectly dilute their votes by entranchising others; then the sovereignty of the people of the United States has become a myth. These "servants of the people" exercise without limit the people's own sovereign power whenever Congress makes a proposal which endows them with that right. This is the inevitable result of making a "scrap of paper" of the provisions of their state constitutions inserted by the people of the five states of Texas, Tennessee, Missouri, Rhode Island and West Virginia to protect themselves from this very abuse of power.

This disposes of the claim that the people of the states, in ratifying the Constitution, ceded away all right to curb or limit the "power" of their agents, the state legislatures, in ratifying Federal amendments, who, strange to say (according to the claim), though clothed with omnipotent power, still remain mere agents of the people of the states for recording the "assent of their states," but assert the right nevertheless, to negative the expressed will of their own people.

To whom, according to this startling theory, could the people of the states have ceded their sovereign rights when they ratified the Constitution? Not to the mass of people inhabiting the territory embracing all the states, for there was no such community in existence and they took no measures for the organization of such a community. If they had intended to do so the very style "United

States," would have been a palpable misnomer, nor would treason have been defined as levying war against *them*. Not to the government of the Union, even if Congress, which merely "proposes" to the states and the legislatures congressionally endowed with omnipotence by the proposal, can all be construed to be part of the Federal government for this purpose. For in the United States no sovereignty resides in government or in its officials.

As Daniel Webster said:¹¹

"The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. Our governments are all limited. In Europe sovereignty is of feudal origin and imparts no more than the state of the sovereign. It comprises his rights, duties, exemptions, prerogatives and powers. But with us all power is with the people and they erect what governments they please and confer on them such powers as they please, none of these governments are sovereign in the European sense of the word, all being restrained by written constitutions."

In the Declaration of Independence, in the Articles of Confederation, in the Constitution of the United States, the cornerstone is the inherent and inalienable sovereignty of the people.

To have transferred sovereignty from the people to a government would have been to have fought the battles of the Revolution in vain—not for the freedom and independence of the people of the states, but for a mere change of masters. Such a thought or purpose could not have been in the heads or hearts of those who moulded the Union, who sought by the compact of union to secure and perpetuate the liberties then possessed. Those who had won at great cost the independence of the people of their respective states were deeply impressed with the value of union, but they could never have consented to fling away the priceless

(11) Congressional Debates Vol. IX, Part 1, page 565.

pearl of the sovereignty of the people of their states for any possible benefit therefrom. And they did not.

The people made the Constitution and the people alone can unmake it.

It is therefore, submitted that the limitations which the people of Texas, Tennessee, Missouri, Rhode Island and West Virginia put upon their state legislatures in the organic law of their creation, are valid and binding. That those five legislatures were "incompetent" to ratify. The so-called Nineteenth Amendment therefore still remains a mere proposal without obligation or pretensions to it.

GEORGE STEWART BROWN.

New York, N. Y.

The Vermont Legislature elected in November 1920, with the women of that state enjoying the elective franchise, ratified the Nineteenth Amendment making the thirty-eighth state as counted. Presumably the election officials of that state, as elsewhere, naturally felt constrained, under pain of possible criminal prosecution, of responsibility in civil damages and even of possible loss of office, to treat the secretary's proclamation of the Nineteenth Amendment as binding upon them. Thus were the women of Vermont themselves permitted to vote upon the question of whether they should be enfranchised by the Nineteenth Amendment. This seems like a political absurdity. The "sovereign people" of Vermont, thus made up of men and women constitute a radically different "state and sovereign people" from the "state and sovereign people of Vermont" to whom the Nineteenth Amendment was proposed for ratification. A new state and sovereign people was thereby constituted. This new state can hardly give its "assent" in place of the "assent" of the pre-existing Vermont, unless we can raise ourselves by our own political boot-straps.

Into such confusion as this we will inevitably run, whenever by "suffrage" amendments, we attempt to disturb the sovereignty of the people.

MASTER AND SERVANT—DISEASE AS ACCIDENT.

UTILITIES COAL CO. v. HERR.

132 N. E. 262.

(Appellate Court of Indiana, Division No. 1, Oct. 4, 1921.)

An occurrence which merely hastens an existing disease to its final culmination will be deemed an "accident" within the meaning of the Workmen's Compensation Act, and, where such occurrence arises out of and in the course of employment, compensation will be awarded.

BATMAN, J. This appeal involves an award in favor of appellees, arising from the death of

Eli A. Herr, an employee of appellant. The only question presented relates to the sufficiency of the evidence to sustain the finding that on the date named said Eli A. Herr "received a personal injury by accident arising out of and in the course of his employment, resulting in his death." Appellant contends that the evidence does not establish this fact, but, on the contrary, conclusively shows that the death of said employee was the result of chronic heart disease, and not of any accidental cause whatever. The evidence tends to show that on June 26, 1920, appellant had a number of men employed in mining coal, including the decedent. On the morning of that day, the decedent, with other employees of appellant, went down into its mine to engage in their usual work. When they reached the bottom of the mine and came to their working place, they found the same so full of smoke that they could not remain therein with comfort or safety, and by reason of that fact returned to the top of the mine. Immediately after the decedent came out of the mine, he walked a short distance to a stairway, sat down on one of the steps, and then fell over. On being carried into the office he was found to be dead. On examination at an autopsy held by the coroner, it was found that the decedent had been afflicted with a serious chronic heart disease. The smoke which caused the decedent and other employees of appellant to leave the mine had been produced by firing explosives early that morning for the purpose of loosening the coal, so that it could be more easily and more rapidly mined, and sufficient time had not elapsed for the air to become pure again before the men went down to work. Where air is impregnated with smoke of this kind, it causes a bad effect to persons who breathe it, and if inhaled too long will prove fatal. It does not affect all persons alike, and its evil results are not always immediate. Appellant's brief discloses that one witness testified that it "causes distress all over; causes your heart to jump and beat as fast as you can count; affects your lungs and your head, and you get weak all over." The smoke on this occasion affected a number of the men who went down into the mine that morning with the decedent to work. It caused one to become sick at his stomach and to have a headache. He was partly overcome by the bad air, and had to take his time in walking to the cage at the bottom of the mine. It caused another to feel dizzy and light. He was to some extent overcome by the bad air, and was attended by a physician. It caused another to have a headache and to vomit. As he walked along the bottom of the mine, "he

didn't have breath enough to walk only a few steps at a time." It made his heart jump and made him dizzy and blind. He got so sick he could not go, but did not become unconscious. After he came out of the mine he was treated by a physician. It made another one sick. He left the mine because of the bad air, and was sick all that day. He felt better the next day, but was not normal.

Appellant bases its contention, that the evidence does not sustain the finding in question, chiefly on the testimony of two physicians who attended the autopsy. This testimony consists of their opinions that the death of said Eli A. Herr did not result from inhaling the impure air in the mine, but from the chronic heart disease. However, if their opinions be accepted as the true cause of his death, it does not follow that the finding under consideration is not sustained by the evidence. This is true for the reason that an occurrence, which merely hastens an existing disease to its final culmination, will be deemed an accident within the meaning of the Workmen's Compensation Act (Laws 1915, c. 106), and where such occurrence arises out of and in the course of an employment, compensation will be awarded. In *re Bowers* (1917), 65 Ind. App. 128, 116 N. E. 842; *Indianapolis, etc., Co. v. Coleman* (1917), 65 Ind. App. 369, 117 N. E. 502; *Retmlier v. Cruse* (1918), 67 Ind. 192, 119 N. E. 32; *Puritan, etc., Co. v. Wolfe* (1918), 68 Ind. App. 330, 120 N. E. 417; *Indian Creek, etc., Co. v. Calvert* (1918), 68 Ind. App. 474, 119 N. E. 519, 120 N. E. 709. There is no direct evidence that the smoke-laden air, inhaled by the decedent on the occasion in question, hastened his death because of the diseased condition of his heart, but such evidence is not necessary in order to establish that fact, if other proven facts will warrant such an inference. *Bronnenberg v. Indiana, etc., T. Co.* (1915), 59 Ind. App. 495, 109 N. E. 784; *Carter v. Richart* (1917), 65 Ind. App. 255, 114 N. E. 110. Directing our attention to the facts set out above, we observe that a man, afflicted with a serious heart disease, went down into a mine, and found the air of his working place filled with smoke that rendered it unfit to breathe, and seriously affected a number of his fellow workmen; that after remaining a short time he left the mine because of the impure air, and on reaching the top he was in such condition that he expired within a short time. It was the province of the Industrial Board to draw any reasonable inference from such facts. It evidently drew the inference that the same elements in the air of the mine, which caused

other workmen to become deaf, dizzy and blind, to have rapid pulsations, headache and shortness of breath, to become sick and vomit, so affected the decedent that death followed, because his diseased heart was unable to withstand the added burden placed on it by inhaling the smoke-laden air while in the mine, and in making an effort to escape from its evil effects. With such an inference in support of the finding in question, it is fully sustained by the evidence. We are unable to say that it is not a reasonable inference, and therefore we have no right to disregard it, although we might consider a contrary inference equally as reasonable. *Bilskie v. Bilskie*, 69 Ind. App. 595, 122 N. E. 436; *Bimel Spoke, etc., Co. v. Loper* (1917), 65 Ind. App. 479, 117 N. E. 527; *City of Linton v. Jones*, 130 N. E. 541.

The award is therefore affirmed.

NOTE—Disease Following Injury as "Accident" Within Workmen's Compensation.—Where a workman's neck was cut while being shaved in a barber shop, and the following day, while handling hides, anthrax germs entered through the cut, causing his death, it was held that the death was due to an injury arising out of the employment. *Eldridge v. Endicott Johnson & Co.*, 189 App. Div. 53, 177 N. Y. S. 863, 4 W. C. L. J. 621.

Where an employee strained himself by lifting, and later died from pneumonia, which the evidence established was due to the injury, the board was justified in finding that the subsequent death was due to an accident arising out of and in the course of the employment. *Folts v. Robertson*, 188 N. Y. 359, 177 N. Y. Supp. 34, 4 W. C. L. J. 429.

Where an employee suffered an accidental injury and later developed hysterical insanity, a finding of the board that the insanity was due to the injury out of the employment was sustained by the evidence. *Kingan & Co. v. Ossam*, Ind. App., 121 N. E. 289, 3 W. C. L. J. 276.

An employee suffered a frost-bite while performing his duties in the service of the master and developed erysipelas, as the result of the injury, which caused his death. His death was held to be due to an accidental injury arising out of the employment. *Larke v. Hancock Mut. Ins. Co.*, 90 Conn. 303, 97 Atl. 320.

Where a workman stepped on a rusty nail and later contracted tetanus by the entrance of germs through the wound, it was held that he sustained an injury arising out of his employment. *Putnam v. Murray*, 174 App. Div. 720, 160 N. Y. S. 811.

This subject is exhaustively treated in the excellent work of Mr. William R. Schneider on *Workmen's Compensation*, §§ 178 and 291. Mr. Schneider's book is not yet off the press, but he was kind enough to permit access to the proof sheets.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS—WHEN AND WHERE TO BE HELD.

Florida—Orlando, June 15 and 16, 1922.

Iowa—Sioux City, June 22 and 23, 1922.

Missouri—Kansas City, Nov. 30, Dec. 1 and 2, 1921.

Nebraska—Omaha, Dec. 29 and 30, 1921.

Oklahoma—Oklahoma City, Dec. 29 and 30, 1921.

Rhode Island—Providence, Dec. 15, 1921.

SYMBOLIC DELIVERY OF POSSESSION.

A recent decision of interest, *Wrightson v. McArthur & Hutchisons, Limited* (ante, p. 553), illustrates a doctrine of law which does not arise so often in the twentieth century as it did in the eighteenth and nineteenth. We refer to the common law principle of "Constructive Delivery," or—as it is sometimes called—"Symbolic Delivery." It is hardly necessary to say that early law found a stumbling-block in the conception of any transfer of property which did not involve actual delivery of possession. In the earliest forms of conveyance of land, the grantor took the grantee upon the land and put him in possession. Where this proved inconvenient, later on, he took him in sight of the land and delivered to him a part of the land, i. e., a clod or twig actually removed from it, in lieu of putting him in actual possession of the whole. Here, again, there was delivery of actual possession, although only of a part, namely, the clod. Later on the grantor was content to hand the grantee any clod or twig, or even an office ruler, in the presence of witnesses, and accompanied by the solemnity of a written conveyance under seal. At this stage, the delivery has become merely symbolic; there is no longer any actual delivery of possession. Nowadays the document of title is signed, sealed and delivered; this is purely symbolic delivery. But it is interesting to note that even today a verbal conveyance is not permissible, nor yet one which is not completed by some delivery to someone, of the document of title. Our conveyancing system has not yet outgrown early symbolism. A clear vestige of it still remains, although of course, by statute corporeal hereditaments lie in grant as well as in livery.

A parallel development took place in connection with the conveyance of personal prop-

erty, at any rate of chattels. If A transfers a chattel to B. it is still necessary that there should be some form of delivery. This may be—

(1) Actual delivery of the possession of the chattel to B.

(2) Constructive delivery, *e.g.*, delivery of a sample of goods in token of the whole.

(3) Symbolic delivery, *i.e.*, delivery of the means of access to and control of the goods, *e.g.*, the key of the warehouse in which they are stored.

(4) Documentary delivery, *i.e.*, delivery of a document of title to the goods, such as a bill of lading, or a dock warrant, or a wharffinger's receipt note comprising the goods.

(5) Delivery by bill of sale, *i.e.*, a document purporting to transfer the goods either at the date of signature, or by conferring on the grantee a power to enter and take them.

Now in all these cases it is easy to see that the old notion, that there can be no transfer of chattels without delivery, is still at the root of the legal rules in the matter. Such delivery may be actual or symbolic; but there is always at least the vestige of a legal fiction that actual delivery of the physical possession of the goods has taken place. In the case of choses in action, which can only be transferred by an assignment in writing, the doctrine also clearly survives. The assignment in writing is not a mere ceremonial requisite to witness the existence of a contract, as is often absurdly stated in legal textbooks; it has nothing to do with contract at all. The writing is not required as a matter of solemn evidence as is often erroneously supposed. The writing is required because it is a symbol of delivery, the only kind of delivery possible in the case of an intangible or incorporeal form of property, such as a chose in action necessarily must be.

If the origin and historical development of this idea of constructive or symbolic delivery is always borne in mind, many of the difficulties which occur in connection with it will tend to disappear. There are many classes of cases in which the doctrine may become important; but the following are the three which most frequently occur:—

(a) Transfer of the property in goods bargained and sold. The risk, of course, passes with the property, so that the question of such transfer is very important.

(b) Registration of documents passing the property in goods, which remain in the apparent possession of the grantor, *i.e.*, bills of sale under the statutes of 1878 and 1880.

(c) Charges on chattels belonging to a company, which require to be registered in order that they may be valid against creditors upon liquidation under the Companies (Consolidation) Act, 1908, s. 93 (1).

It was in connection with this third class of case that Mr. Justice Rowlatt had to decide *Wrightson v. McArthur and Hutchisons, Limited* (*supra*). Here a company was in liquidation. In a compartment on its premises the liquidator found goods which were claimed by the plaintiff. The company had agreed to secure the plaintiff against loss on a certain contract undertaken by him, and sent him a letter agreeing to set aside a quantity of goods in a special compartment of their premises for his benefit in respect of their liability to indemnify him. They set aside the goods, locked the compartment and handed him the keys. Then they sent him another letter in which they said: "You can have the right to remove same as desired." The plaintiff claimed that these goods had been delivered to him and were in his physical possession, as possessor of the key, at the date of the liquidation. On the other hand, the liquidator took the view that the letter created a charge on the chattels, and that such charge required registration under s. 93 (1) of the Companies (Consolidation) Act, 1908. As it had not been registered, the liquidator claimed that the charge was void, and that the goods were available for the benefit of all the creditors.

Not if the only effect of the letters which passed between the parties was to create a charge in favor of the plaintiff on goods remaining in the company's possession, it is quite clear that such a charge must be registered. Ingenious attempts were made to get out of this by the plaintiff. It was suggested that the real transaction was a *verbal* pledge of the goods, and that a "pledge" is not a "charge" within the meaning of the statute, and so does not require to be registered. *Morris v. Delobell-Filipo* (1892, 2 Ch. 352). But, while it is true that a "pledge" is a common law conception, whereas a "charge" is the creature of equity, it is not possible seriously to suggest that a common law "pledge" is not also a "charge" in equity. Pledge is a form of bailment, and every bailment is a form of common law trust. *Re Hardwick, Ex Parte Hubbard* (17 Q. B. D. 690); equity gave additional remedies to the *cestui qui trust*, but did not create the trust which it enforced. Equity created many new forms of "trust" and "charges" unknown to the common law and unenforced by it; but it did not, in so doing, create a

wholly novel juridical conception. A "charge," then, cannot be said to be so purely the creature of equity that no common law bailment or pledge can satisfy its definition. If a common law pledge fulfils all the requisites of an equitable "charge," then it is a "charge," and requires—in a proper case—registration, as such, under s. 93 (1) of the Act of 1908.

Again, it was argued on behalf of the claimant that, supposing the transaction was not a verbal pledge, but a conveyance in writing, nevertheless it escaped being a "charge" on another ground. No money was secured by the document. It was simply an agreement conferring on the grantee a right in equity to sue for and obtain a charge on the chattels in the event of the condition happening which entitled him to the goods. But such a contention is hardly arguable. An equity to sue for a charge is another name for an equity to a charge, and such an equity—upon part-performance by the grantee, such as had here occurred—is already a charge and treated as such in a Court of Equity. Clearly then, apart from other considerations which can easily be urged against this plea, the document is a "charge" and, therefore, registrable as such unless excluded from the operation of the section.

But these were only minor contentions. The case of the plaintiff really rested upon the contention that the possession of the goods had actually passed to him. The statute applies only in the case of "charges," i.e., transactions in which the grantor remains in possession of the goods in which the grantee takes conditional right. Where the chattels are in fact passed out of the possession of the grantor into that of the grantee, there is no longer any such "charge" as the statute contemplates. The security arises under the delivery of possession.

The real point, accordingly, is simply this, whether or not there has been delivery of possession of the goods to the grantee. And this question of possession turns upon whether or not there has been any one of the five forms of delivery discussed earlier in this article. Now, it seems reasonably clear that there has been symbolic delivery of possession. Had the goods been transferred to a stranger's warehouse, and the key then handed to the grantee, there would have been a simple every-day case of symbolic delivery. Further, had all the goods in the defendants' premises been the subject of the grant, and the key of the whole premises handed over, the case would equally have been covered by authority as one of symbolical delivery, *Hilton v. Tucker* (39 Ch. D. 669). Here,

however, the facts fall short of either of those possibilities. There was a partial delivery of goods, in a special compartment, locked away, accompanied by delivery of the key, and the grant of a license in writing to remove the goods at any time. Now, if we go back to first principles, the meaning of this is clear. The intention is to transfer complete control over the goods to the grantee, but it is inconvenient for him to take them all away. Hence there is delivery to him of the means of complete control over the goods, namely, the key and the license to remove. Obviously, the parties have done all they can to transfer possession without actual removal of the goods. This is therefore a symbolic delivery. *Ward v. Turner* (2 Ves. Sen. 431).

"Symbolism," all-dominant in the life of early man with his Totems and Taboos, has not yet completely spent its force. Some psycho-analyst of the future will probably derive interesting conclusions as to the nature of our civilization and the character of its superstitions from the survival of such "complexes" as are involved in this and other cases of legal symbolism.—*Solicitors' Journal*.

HUMOR OF THE LAW.

"To hell with John Lewis and Gov. Allen," says Alexander Howat. Which recalls the story of the controversy between the English bishop and the judge.

"You can only say, 'You be hanged,'" boasted the bishop. "I can say 'You be damned,'" "Yes," replied the judge, "but when I say, 'You be hanged,' you are hanged."—*Kansas City Star*.

Rookie Sentry: Halt, who's there?

Voice: Private Stock, Company C.

Rookie Sentry: Advance, Private Stock, and be sampled.—*American Legion Weekly*.

The following contemporary account of a hearing before Lord Eldon is worth recalling. The names of the counsel are familiar to the students of Vesey Reports (if any such remain):

Mr. Leach made a speech

Impressive, clear and strong;

Mr. Hart made his part

Tedious, dull and long;

Mr. Parker made that darker

Which was dark enough without;

Mr. Cook opened his book,

And the Chancellor said—I doubt—

WEEKLY DIGEST.

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1. **Actions—Splitting Cause of Action.**—In view of Negotiable Instruments Law, §§ 48, 82, 87, the prohibition in Code, art. 50, § 2, against instituting more than one suit on a joint and several note when the persons "executing the same" are alive and reside in the same county does not apply to prevent successive suits against accommodation indorsers, for the liability of an accommodation indorser of a note is secondary, and not joint, but several and he is not a person "executing the same" within the statute, although one assuming primary liability on the paper is undoubtedly one "executing the same."—*Bradley v. Louisville Food Products Co., Md., 114 Atl. 913.*

2. **Assignments—For Collection.**—Where defendant, though indebted to a corporation, loaned money to it in a sum less than his indebtedness, receiving its note therefor, and plaintiff, a creditor of defendant, brought suit against him, serving writ of garnishment on the corporation, it might set up defendant's indebtedness to it as a defense, notwithstanding it had assigned its claim to a third person for collection; Rem. Code 1915, § 191, giving right of set-off against the assignee, being persuasive, and the rule of estoppel by assignment being applicable only between assignor and assignee.—*Austin v. Wallace, Wash., 200 Pac. 566.*

3. **Attachment—Summons Unnecessary.**—In proper instances, where civil actions are commenced, and service is obtained by attachment on defendant's property, and publication of a notice based on the jurisdiction thus acquired, the issuance of a summons is unnecessary.—*Jenette v. Hovey & Co. N. C., 108 S. E. 301.*

4. **Automobiles—Collision.**—Where plaintiffs, traveling in an automobile at a reasonable speed, had passed beyond the center of a street intersection, and were presumably out of the zone of danger from any vehicle approaching from the east, and were struck by defendant's motortruck, which was exceeding the legal speed limit, at a place out of the line of travel from that direction, plaintiffs were not guilty of contributory negligence as a matter of law in failing to keep watch for the truck.—*Simonsen v. L. J. Christopher Co., Cal., 200 Pac. 615.*

5. **Bankruptcy—Contribution.**—Where a brokerage firm lawfully repledged securities pledged with them by their customers, and after the bankruptcy of the brokers the subsequent pledgee sold a portion of the securities to satisfy its debt and returned the others to the receiver in bankruptcy, the owners of the se-

curities which were sold are entitled to contribution from those whose securities were returned, though they would not be so entitled if the returned securities had been unlawfully repledged, and therefore the owner of the securities which were returned cannot reclaim them from the receiver in bankruptcy.—*In re Toole, U. S. C. C. A., 274 Fed. 337.*

6. **Bills and Notes—Admissibility of Evidence.**—In an action on note given for exclusive right to publish musicians' directory in certain states where defendant set up fraud and misrepresentation, testimony concerning acts and conduct of plaintiff subsequent to the consummation of the sale was properly admitted, to be considered by the jury in connection with the question whether the sale was induced by false and fraudulent representations.—*Horowitz v. Kuehl, Wash., 200 Pac. 570.*

7. **Definite Time.**—Held, that an agreement to extend notes "until frost" is an agreement to extend to a definite time.—*West Texas Loan Co. v. Montgomery, N. M., 200 Pac. 681.*

8. **Holder in Due Course.**—Where property was sold to defendant and a conditional bill of sale was given, later followed by an unconditional bill of sale, title to the goods passed by the unconditional bill of sale, and a defense to the note, given for the price of the goods, that certain of the goods sold were not owned by the seller, payee of the note, and had been taken from defendant by the real owner, although good against the payee of the note, was not good against plaintiff, a holder in due course.—*Bowen v. Rury, Wash., 200 Pac. 783.*

9. **Substitution.**—In payee's action on a note executed by defendant to procure funds wherewith to promote a proposed corporation the payee's agreement to substitute for such note the note of the corporation held no defense, in the absence of an allegation that the note of the corporation was ever tendered to the payee.—*Hale v. Gardiner, Cal., 200 Pac. 598.*

10. **Brokers—Commission.**—Where a real estate broker procures a customer willing, ready, and able to purchase property offered for sale according to the terms of the offer, and the transaction is defeated on account of some fault of the principal, the broker is entitled to his commission, although the sale is not consummated.—*Hutchins & Co. v. Sherman, Fla., 89 So. 430.*

11. **Carriers of Goods—Delay.**—A railroad company is not estopped from relying on a provision of a bill of lading that the "amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment," because the consignees were not given notice of a loss in transit until long after the shipment was due to arrive, though the replacement value of the goods was higher when notice of loss was finally received, a loss resulting from delay in delivery being within the class of losses to which such provision refers.—*Fahey v. Baltimore & O. R. Co. Md., 114 Atl. 905.*

12. **Duty to Accept.**—Generally a court may compel a carrier in the exercise of its public duty to accept goods tendered to it for shipment, and thus impose on it the absolute duty to deliver them at their designated destination.—*Mobile & O. R. Co. v. Zimmern, Ala., 89 So. 475.*

13. **Liability of Initial Carrier.**—Since the passage of the act of 1906, from which § 2777 of the Civil Code of 1910 was codified, the initial carrier in an interstate shipment "is liable for loss occasioned anywhere en route, whether on its own lines or not, where it voluntarily receives the shipment, notwithstanding an agreement or stipulation in a bill of lading limiting liability to loss, damage, or injury occurring on its own lines."—*Heath v. Sandersville R. Co., 23 Ga. App. 255 (5), 98 S. E. 92. Director General of Railroads v. Beard, Ga., 108 S. E. 310.*

14. **Limitation of Liability.**—While a common carrier may charge a rate for transporting of freight, to be determined according to the value of the article shipped, the carrier cannot, by an arbitrary agreement as to the value of

the article, limit its liability for its loss or damage through the fault of the carrier.—*Bailey v. American Ry. Express Co., Ga.*, 108 S. E. 303.

15. **Charities—Gift to Town.**—Under Pub. St. c. 40, §1, authorizing towns to purchase and hold real and personal estate for the public uses of the inhabitants, a town may acquire property under a will bequeathing to it the residue of testator's estate on condition that it keep his burial lot in proper repair by consenting to act as trustee of the fund for such purpose, since the statute cannot be considered as authorizing towns to hold only such property as they have acquired by bargain and sale.—*Petition of Tuttle, N. H.*, 114 Atl. 867.

16. **Chattel Mortgages—Conditional Sale.**—Where manufacturer of automobiles drew drafts on a sales agent with bill of lading attached and the bank paid such drafts transmitting the funds directly to the manufacturer and allowing the agent to take possession and resell the automobiles, held, that the transaction was one of conditional sale and not a contract for an equitable mortgage, notwithstanding the sales agent executed note for the advances; the bank reserving title.—*Sternberg v. City Nat. Bank of Ft. Smith, Ark.*, 233 S. W. 691.

17. **Commerce—Order of Interstate Commerce Commission.**—A finding by the Interstate Commerce Commission that a prior order making an allowance to tap lines for the haul of cars from place of loading to the junction point, based on mileage, covered only the direct movement from loading to junction point, and did not entitle a tap line to include additional distance necessary to reach a weighing scale, on the ground that it was not shown to be a necessary movement by such line, held correct as matter of law and not reviewable on the facts, where all the evidence on which it was based is not before the court.—*Louisiana & P. B. Ry. Co. v. United States, U. S. D. C.*, 274 Fed. 370.

18. **Constitutional Law—Investigation of Strikes.**—G. L. c. 150, § 3, authorizing the board of conciliation and arbitration to investigate the cause of any strike or lockout where more than 25 persons are employed, ascertain which party is mainly responsible, or blameworthy, and make and publish a report assigning responsibility, is valid under Const. pt. 2, c. 1, § 1, art. 4, authorizing the General Court to pass laws for the good and welfare of the commonwealth, since a strike involving more than 25 employees is of sufficient public concern to justify an impartial investigation, in view of the disorder and violence frequently accompanying strikes.—*Moore Drop Forging Co. v. Fisher, Mass.*, 132 N. E. 169.

19. **Right of Appeal.**—That part of § 16, chapter 113 House Bill No. 276, Sess. Laws 1917, which attempts to limit the right of a person to appeal from judgments of courts not of record in civil cases where the amount involved in the appeal, exclusive of interest and costs, does not exceed \$100, violates the constitutional right of appeal guaranteed by § 19, article 2, of the Bill of Rights, and is void.—*Peterman v. Chapman, Okla.*, 200 Pac. 776.

20. **Contracts—Mutuality.**—A contract whereby a glue factory agreed to sell to a jobber who was not engaged in any business requiring the use of glue, but desired the product merely for resale, all the jobber's requirements of glue at a stated price, without any stated consideration paid by the jobber and without any promise by him to take any glue, lacks mutuality, and is not enforceable against the factory.—*Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory, N. Y.*, 132 N. E. 148.

21. **Mutuality.**—A contract to purchase the entire output of a plant for a given period is not void for want of mutuality.—*Oldershaw v. Kingsbaker Bros. Co., Cal.*, 200 Pac. 729.

22. **Corporations—Corporate Seal.**—The presence of the seal of a corporation is prima facie evidence of the power of the officers affixing it to transact the business evidenced by the documents to which the seal is affixed.—*San Ramon Valley Bank v. Walden Co., Cal.*, 200 Pac. 662.

23. **Customs Duties—Unlawful Use of Vehicle.**—The provisions of the customs laws, providing that every vehicle carrying merchandise subject to duty or unlawfully imported shall be subject to seizure and forfeiture, etc., have been repealed, in so far as they related to intoxicating liquors imported into the United States for beverage purposes, by the National Prohibition Act, popularly known as the Volstead Act which covers the subject-matter fully in title 2, § 25.—*United States v. One Touring Car, U. S. D. C.*, 274 Fed. 473.

24. **Divorce—Undivided Remainder in Estate.**—Where an unambiguous will, by the terms of which the real estate thereby devised becomes equitably converted into personality, has been admitted to probate without objection, and the estate thereby conveyed has been fully ascertained and inventoried by the executor, and all debts have been paid, and administration has been fully completed except final distribution, which is delayed only by the existence of the life estate, an undivided remainder in the estate is not in the custody of the county court so that the district court may not award it to the wife of the remainderman in a suit by her for divorce.—*Maxwell v. Maxwell, Neb.*, 184 N. W. 227.

25. **Electricity—Rates.**—Under Code Civ. Proc. § 449, requiring actions to be prosecuted by the real party in interest, and § 448, authorizing one to sue for the benefit of all where the cause of action is common, a city which is not bound by the rates specified in the schedules filed by a gas and electric company with the Public Service Commission cannot sue as the representative of consumers to enjoin collection of such rates.—*City of Oswego v. People's Gas & Electric Co., N. Y.*, 190 N. Y. S. 39.

26. **Eminent Domain—Abutting Property.**—Where the owner of an abutting tract is damaged by the location of switchyards, roundhouse, coal schutes, pits, etc., his right of recovery is not governed by the law relating to recovery for damages caused by a nuisance, but is governed by the law of compensation for damages sustained by the location and necessary operation of a public service or utility. The constitution provision that "private property shall not be taken or damaged for public use without just compensation" means that the public shall neither take nor damage private property for public use without justly compensating the owner thereof.—*St. Louis & S. F. R. Co. v. Ledbetter, Okla.*, 200 Pac. 701.

27. **Executors and Administrators—Appointment of Widow.**—Widow cannot be denied appointment because of speculation that she will mismanage estate or prove unfit.—*Maddox v. Maddox, Ga.*, 108 S. E. 304.

28. **Frauds, Statute of—Memorandum.**—The note or memorandum of sale required by the statute must state the contract with such certainty that its essentials can be known without aid of parol proof or by a reference therein to some other writing or thing certain, and such essentials must at least consist of the subject, terms of the sale, and parties to it, so as to furnish evidence of a complete agreement.—*Gendleman v. Mongillo, Conn.*, 114 Atl. 914.

29. **Written Contracts.**—C. S. § 988, requiring contracts to sell or convey land to be in writing, refers only to a case where, as a result of a sale or exchange, a conveyance from one to the other of the contracting parties is contemplated, and not to an agreement for one of the parties to furnish the money to take up an option for land which the other had and take title in his name and divide the profits on a resale.—*Newby v. Atlantic Coast Realty Co., N. C.*, 108 S. E. 323.

30. **Gas—Obligation to Give Service.**—The commission does not have power to compel by order a gas company, which is not a pipe line company, to furnish a supply of natural gas to another gas company, to enable such other gas company to comply with its contract to supply a municipality and its inhabitants.—*Village of St. Clairsville v. Public Utilities Commission, Ohio*, 132 N. E. 151.

31. **Rates.**—Where Laws 1906, c. 125, set the rate for the use of gas at \$1 per thousand cubic feet, and this was repealed by Laws 1916, c. 604, and Laws 1917, c. 666, setting the rate at

vice Commission has sole power to set a rate either on its own motion or on application of the public utility company under § 66, c. 48, 80 cents per thousand, which was held unconstitutional because confiscatory, there is no valid statutory rate, and hence the Public Service Commission Laws, and a court of equity is without jurisdiction to fix a rate.—*Morrell v. Brooklyn Borough Gas Co.*, N. Y., 132 N. E. 129.

32.—**Rates.**—Where Public Service Commission Law, § 66, subd. 12, was in force when the plaintiff city gave its consent to use its streets the statute provision that the defendant could abrogate it as to the rate stipulated to gas consumers, and put in operation a new schedule and reasonable rate on 30 days' notice to the commission under § 65, subd. 1, and 30 days' publication as required by the Commission, subject to its review under §§ 71 and 72, such provision became a part of consent obligations, so that the city may not enjoin the gas company from increasing its rates without first obtaining the commission's adjudication as to reasonableness.—*Town of North Hempstead v. Public Service Corporation of Long Island*, N. Y., 132 N. E. 144.

33.—**Guaranty**—Valid Consideration.—An agreement of guaranty of payment of promissory note by creditor of maker having property in his hands, was supported by a valid consideration, where the payee of the note agreed not to put into execution a threat made by him to the creditor that he would garnish to satisfy the note, whether such payee could or could not have realized anything or obtained any benefit from an attachment of the property.—*Kinney v. Jos. Herspring & Co.*, Cal., 200 Pac. 737.

34.—**Innkeepers**—Entry of Guests' Room.—Where a guest of a hotel is occupying his room and is neither engaged in nor permitting improper conduct therein, nor affording any just ground to suspect such, it is an unjustified intrusion upon the guest, and a trespass upon his rights incident to his occupancy of the room for the hotel keeper to effect an uninvited and unpermitted entry into the room for the purpose of ascertaining whether improper conduct on the part of the guest or any one is transpiring therein.—*Newcomb Hotel Co. v. Corbett*, Ga., 108 S. E. 309.

35.—**Insurance**—Collision.—Where edge of roadway on which automobile had been swerved to avoid collision gave way, causing automobile to overturn and roll down mountain side, the damage to automobile from contact with the ground and objects thereon while rolling was not "caused solely by collision with another object," within automobile policy.—*Moblod v. Western Indemnity Co.*, Cal., 200 Pac. 750.

36.—**Disability.**—Where an insured, within 12 hours after accidentally cutting his finger became sick with blood poisoning, and on the third day took to his bed, which he never left, there was a disability within the meaning of a policy insuring against bodily injury caused by external, violent, and accidental means "which shall from the date of the accident result in continuous disability," the policy not meaning that there must be a disability from the very moment of the injury, that being impossible in case of blood poisoning.—*Rorabaugh v. Great Eastern Casualty Co.*, Wash., 200 Pac. 587.

37.—**"Felony Taking."**—Where a contract of insurance insures the proprietor of a jewelry store against robbery committed on his premises which robbery is defined in the policy as "an overt felonious act committed in the presence of a custodian and of which he was actually cognizant," a felonious taking or conversion by a customer of a diamond ring on the premises of the insured, even though done in the presence of the clerk or custodian, as contemplated in the policy, is not such a felonious taking as is insured against by the policy, unless the clerk having the ring in custody had actual knowledge of its felonious taking or conversion.—*Van Keuren v. Travelers' Indemnity Co.*, Ga., 108 S. E. 310.

38.—**Libel and Slander.**—Libel per se.—Statement that one in his business as a jeweler was a crook, and that he got away with a diamond intrusted to him, is actionable per se, under Civ. Code, § 46, as calculated to injuriously af-

fect him in his business.—*Williams v. Seiglitz*, Cal., 200 Pac. 635.

39.—**Limitation of Actions**—Claims for Extras.—Statute of limitations started to run as to claims by contractor for extras not provided for in contract when they were done, there being nothing in the contract to postpone payment of them until 15 days after the whole job was completed, which was the time for payment under the contract for work specified.—*Maryland Casualty Co. v. West Const. Co.*, Md., 114 Atl. 890.

40.—**Master and Servant**—Admissibility of Evidence.—Evidence that a flagman of a railroad train, a few minutes after having attended to his duties, in going back along a track to flag a train, was seen sitting on the outside of the rails of an adjacent track on the projecting cross-ties, and that shortly after a train had passed over the latter track the flagman was found lying by the track unconscious, with such a wound in his head as could have been made by a passing train, warrants the inference that he was injured from being struck by a passing train.—*Payne v. Young*, Ga., 108 S. E. 312.

41.—**Assumption of Risk**—If there was a custom of the owner of sheep to come to the herder's help and protection on the range during a storm, which may reasonably have warranted his going out in a cold storm after the sheep which had strayed from the camp, it cannot be said as a matter of law that he assumed the risk, where the aid did not come.—*Lemos v. Madden*, Wyo., 200 Pac. 791.

42.—**Casual Employment.**—An owner, who lets house for profit, and at irregular times, when demanded, has labor performed in the repair thereof, is not engaged in the prosecution of a "trade" or "business" within the Workmen's Compensation Act, upon which a charge as compensation for injury sustained by an employee casually engaged in doing such work can be imposed.—*Ford v. Industrial Accident Commission*, Cal., 200 Pac. 667.

43.—**Compliance With Statute.**—Under Crawford & Moses' Dig. § 7284, requiring not less than 200 cubic feet of air per minute to pass each working place in mines, it is no defense to an action for negligence based on noncompliance with the statute that it is not practical to comply therewith; this being a question for the Legislature.—*Central Coal & Coke Co. v. Barnes*, Ark., 233 S. W. 683.

44.—**Employers' Liability Act.**—Under Employers' Liability and Workmen's Compensation Act, § 4, providing that a right of action at common law for damages caused by injury to a workman shall not be affected by the act, unless the workman shall avail himself of the act, the answer of the workman that he claims no compensation under the act prevents the court from having jurisdiction in the employer's suit under the act to determine the compensation.—*Sullivan Machinery Co. v. Stowell*, N. H., 114 Atl. 873.

45.—**Mechanics Liens**—Description of Land.—Where there was no fence, nor any mark or stake on the surface of land, to show the boundaries of a lot on which a house was being erected, and there was no plan in the possession of the contractors, showing any division of the land into separate lots a petition describing the land on which the lien was sought by the description by which it was conveyed to the owner was sufficient, though one orally contracting to buy the land had divided it into lots.—*Bordier v. Davis*, Mass., 132 N. E. 171.

46.—**Municipal Corporations**—Judicial Power.—Under Burns' Ann. St. 1908, § 8716, relative to the appointment of appraisers to reassess the benefits from street improvements upon the petition of property owners, the court's only authority is to appoint the appraisers and adjudicate the costs incident to the review, and is under no duty to consider the report and has no power to reject or approve it.—*City of Indianapolis v. State*, Ind., 132 N. E. 165.

47.—**Power to Tax.**—The word "assessment" as used in the Constitution of the state in § 5 of article 9 has the double significance of listing and valuing property for the purpose of apportioning a tax upon it according to valuation, as well as determining the amount of money to be raised by exercise of the taxing

power.—*Town of Auburndale v. Cline, Fla.*, 89 So. 427.

48.—**Public Utility.**—The "Home Rule Law." Laws 1913, c. 247, does not create such an interest on the part of a city as will permit it, in a suit by a citizen to enjoin collection of a rate by a public utility company, whose franchise comes from the state, to intervene under Code Civ. Proc. § 452, which provides that a party having an interest in litigation may be brought in on his application; "interest" as used in the statute meaning a property interest, and hence does not apply to the city, which is given no power over the rates of public utilities, and which is not affected by the rate as a consumer.—*Morrell v. Brooklyn Borough Gas Co., N. Y.*, 132 N. E. 130.

49. **Physicians and Surgeons**—Validity of Statute.—St. 1917, c. 218, § 1, authorizing the board of registration in medicine to revoke or cancel any certificate, registration, or license for deceit, malpractice, or gross misconduct in the practice of the profession, is not invalid, as soundness of moral fibre is as essential to the public health as medical learning, and it is for the Legislature to determine within reasonable bounds what the tests for moral character shall be.—*Lawrence v. Briery, Mass.*, 132 N. E. 174.

50. **Pleading**—Mutual Mistake.—Fraud or mutual mistake cannot be shown under a general denial in a reply pleading an answer to a settlement.—*Stuart v. Torrey, Neb.*, 184 N. W. 215.

51. **Principal and Agent**—Relation Under Contract.—An agreement between an oil company and another, by which he undertook to handle delivery of oil and to make sales on a commission basis, using his own teams and vehicles and employing and discharging his own servants, subject to directions of the company's representatives, construed, and held to create the relation of principal and agent so as to render the company liable to a customer for damages by a fire set by an explosion from negligent delivery by the servants employed.—*Magnolia Petroleum Co. v. Johnson, Ark.*, 233 S. W. 680.

52. **Railroads**—Contributory Negligence.—In action for personal injuries received in the nighttime when plaintiff's automobile ran into an electric light pole erected by defendant power company at defendant railroad station, where plaintiff had taken a passenger, the mere fact that the driver of the car could have seen the pole before he ran into it while traveling at five miles an hour, or in low, was not sufficient to nonsuit him, since, to justify that action, court must be able to say that, not only could he have seen the pole, but also that had he used reasonable care under all the circumstances he would have seen it in time to avoid hitting it.—*Luckhart v. Director General of Railroads, Wash.*, 200 Pac. 564.

53.—**Federal Control.**—In an action against the Director General of Railroads, no recovery can be had of a penalty imposed for violation of a state statute, as distinguished from compensatory damages.—*Bliss v. Oregon Short Line R. Co., Idaho*, 200 Pac. 721.

54.—**Federal Control.**—Section 206 (f) of the act of Congress passed February, 28, 1920, which provides that "the period of federal control shall not be computed as a part of the periods of limitations in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to federal control," applies only to federal courts.—*Georgia Southern & F. Ry. Co. v. Smiley, Ga.*, 108 S. E. 273.

55.—**Last Clear Chance.**—That the fireman on a train while the whistle was being blown saw plaintiff slowly approaching a crossing 350 or 400 feet ahead in an automobile and took no action to stop the train held not to tend to support an allegation of negligence under the "last chance" doctrine on the ground that those in charge of the train saw plaintiff in a dangerous position and did not try to avoid his injury, the fireman being justified in supposing that he would stop before reaching a point of danger.—*Sutherland v. Payne, U. S. C. C. A.*, 274 Fed. 360.

56. **Sales**—Conversion.—Notwithstanding the requirement of Code Civ. Proc. § 367, that every action be prosecuted in the name of the real party in interest, one in the rightful possession of an automobile as a purchaser from the registered owner, though not complying with the requirements of the Vehicle Act, § 8, as amended by St. 1917, p. 391, as to transfer of a registered car, may sue in replevin or for conversion of the car, for actual possession of a chattel at the time of conversion thereof will sustain trover, except as to the true owner, or one claiming under him, though the title be in a third person.—*Moody v. Goodwin, Cal.* 200, Pac. 733.

57. **Specific Performance**—Arbitration Clause.—The presence of an arbitration clause in a contract does not necessarily prevent the court from granting specific performance, and it is only where the act to be performed by the board of arbitrators is of the essence of the contract that the court will refuse to act.—*Nakdimen v. Atkinson Improvement Co., Ark.*, 233 S. W. 694.

58.—**Delay.**—Where time for payment of remaining purchase money (\$54,700) was fixed by a contract as June 1st, \$1,000 having been paid down, and time was first extended to June 7th, and then to June 14th, on which latter date defendant seller contracted for sale of the property to third persons, held that the lapse of time under the circumstances was a sufficient bar to a decree for specific performance, such purchase money not having been tendered.—*De Crette v. Bonaparte, Md.*, 114 Atl. 880.

59. **Statutes**—Obligations of Village.—So much of Laws 1911, c. 513, as makes reasonable compensation for additional work, labor, and services in connection with the work covered by the terms of the contract thereby legalized a legal and binding obligation of the village of Port Chester is valid, under Const. art. 3, § 16, as such services are mentioned in the title and embraced in the general subject of the act, and such general subject is single.—*Gaynor v. Village of Port Chester, N. Y.*, 132 N. E. 145.

60.—**Titles and Subjects.**—Acts 1916, c. 30, does not violate Const. art. 3, § 29, in that according to the title the referendum is to be of the question "whether or not the sale, manufacture for sale and transportation for sale of alcoholic, spirituous, vinous, malt and intoxicating liquors for beverage purposes shall be forever prohibited in said political units," whereas § 5 provides that it shall be unlawful to manufacture for sale, sell, or purchase for sale, or otherwise dispose of any spirituous, vinous, fermented, distilled or malt liquors, or "intoxicating bitters, or liquid mixtures, whether patented or not, which will produce intoxication," in such political units.—*Kelly v. State, Md.*, 114 Atl. 888.

61. **Trial**—Statement of Counsel.—In a servant's action under the Employers' Liability Act for injuries, where defendant employer's counsel compared the action of the defendant in sprinkling a floor (which sprinkling had caused the injury) with that of farmers and storekeepers, and plaintiff's counsel said that any suggestion about the storekeeper or the farmer had no application, and defendant's counsel knew it, such statement by plaintiff's counsel was not misleading or prejudicial to defendant.—*Watts v. Derry Shoe Co., N. H.*, 114 Atl. 859.

62. **Vendor and Purchaser**—Anticipatory Breach.—Since, to constitute an anticipatory breach, refusal to perform must be positive and unconditional, a purchaser's demand for repayment of his deposit on his discovering defects in title before date of performance was not, as respects the purchaser's right to recover his deposit for the vendor's breach, an anticipatory breach as a matter of law, where both before and after such demand he told the vendor that what he wanted was either the property or his money.—*Friedman v. Katzner, Md.*, 114 Atl. 884.

63. **Wills**—"Child or Children."—In a devise of a remainder, the expression "child or children" cannot be construed to include grandchildren.—*Hunt v. Wickhan, N. Y.*, 190 N. Y. S. 16.

Central Law Journal.

St. Louis, Mo., December 9, 1921.

CONTRACTING AGAINST FRAUD

In *Dieterich v. Rice*, 197 Pac. 1, decided by the Supreme Court of Washington, it appeared that the plaintiffs had entered into a written contract with the defendant, by the terms of which they agreed to purchase, for a stated consideration, certain described lands. The complaint contained a number of allegations of gross misrepresentation and fraud on the part of the defendant. The contract in question contained the following clause:

"This land is sold to second party subject to any and all county roads and with the understanding that he has personally and carefully inspected said premises, and is purchasing the same by said inspection, and not from any other sayings or inducements by first party or his agents, and there has been no other inducements other than recited herein, and that no changes or verbal agreements now or hereafter will be binding on either party, unless reduced to writing and signed by both first and second parties."

A general demurrer was filed to the complaint, which was sustained by the trial court. It was contended by the defendant that the plaintiffs were estopped to urge the representations alleged as fraudulent by the above quoted clause of the contract. The Supreme Court, however, reversed the trial court and held that the complaint stated actionable fraud, and that the complainants were not estopped to show the fraudulent nature of the contract by reason of the recitals therein. The Court declared that the contention in question was so effectually answered by the Court of Appeals of New York, in the case of *Bridger v. Goldsmith*, 143 N. Y. 424, 38 N. E. 458, that it felt justified in quoting from it at considerable length. In that case the de-

fendant sold to the plaintiff his business, fixtures, and property, making grossly false and fraudulent statements as to the character and value of the property and the extent and magnitude of the business to induce the purchase. The contract of sale was reduced to writing and executed under seal. It contained the following clause:

"It is expressly understood and agreed between the parties hereto that the said party of the first part has not, in any manner or form stated, made or represented to the said party of the second part, for the purpose of inducing the sale of the said business or the making of this agreement, any statements or representations, verbally or in writing, in respect to the said business, other than that the said party of the first part has been engaged in the piano business in the City of New York since 1867."

Discussing the question whether this clause estopped the plaintiff from asserting the fraudulent representations to avoid the sale, the Court said:

"It is urged by the learned counsel for the defendant that, as this stipulation was inserted in the writing, which is under seal and assented to by both parties, the action cannot be maintained. I assume that the fact that a seal was unnecessarily affixed to an agreement for the sale of personal property cannot affect the rights of the parties. Every defense is open to either party that would have existed in case the writing was unsealed. It appears that, after the negotiations had been completed and the agreement drawn, the defendant stated, in the presence of the plaintiff, and the counsel for both parties present, that he wanted a clause of this character inserted. The plaintiff's counsel at first objected to it. The defendant's counsel suggested that it would make no difference, and the plaintiff consented that it might be put in. There is evidence in the case tending to show that the plaintiff voluntarily assented to this stipulation after having been advised by his counsel that it would have the effect of precluding him from subsequently alleging fraud in the transaction, even though it existed in fact. This provision is not a covenant in any proper sense of

that term. Indeed, it can scarcely be considered as any part of the agreement at all. It does not relate in any manner to the subject-matter of the contract. It was a mere statement in the nature of a certificate as to a fact. It did not relate to the property or to the terms of the sale or the payments, but to the absence of all fraud from the transaction. The clause cannot be given any greater effect than if it had been written upon a separate paper after the execution of the contract and signed by the parties. The question now is whether it can be given the effect claimed for it by the learned counsel for the defendant to preclude the plaintiff from alleging fraud in the sale and pursuing in the courts the remedies which the law gives in such cases. It cannot operate by way of estoppel for the obvious reason that the statements were false to the defendant's knowledge. He may, indeed, have relied upon its force and efficacy to protect him from the consequences of his own fraud, but he certainly could not have relied upon the truth of any statement in it. A mere device of the guilty party to a contract intended to shield himself from the results of his own fraud, practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel. If the clause has any effect whatever, it must be as a promise or agreement on the part of the plaintiff that, however grossly he may have been deceived and defrauded by the defendant, he would never allege it against the transaction or complain of it, but would forever after hold his peace. It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there was in his own mind at least a lingering doubt as to the honesty and integrity of his conduct. I assume that there is no authority that we are required to follow in support of the proposition that a party who has perpetrated a fraud upon his neighbor may, nevertheless, contract with him in the very instrument by means of which it was perpetrated for immunity against its consequences, close his mouth from complaining of it, and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice.

The maxim that fraud vitiates every transaction would no longer be the rule, but the exception. It could be applied then only in such cases as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing.

"This clause cannot be separated from the transaction in which it originated. It is tainted with the same vice and must share the same condemnation. As the chain can be no stronger than its weakest link, so this clause cannot be made to survive the rest of the transaction as a shield and protection to the defendant.

"Much of the argument in support of the appeal rests on the proposition that the defendant would not have assented to the sale without this clause, and, as the plaintiff obtained such assent only by acquiescing in its insertion in the writing, he ought not now to be permitted to question it. Without inquiring what the result would or ought to be in case this assumption was correct, it is sufficient to observe that no such fact is found, and in the sense in which the defendant claims it could not have been found from the testimony. While at the end of the transaction he did suggest that the clause should be inserted, and perhaps insisted upon it, yet to say that he would not have made the sale under the same circumstances without it, had the plaintiff refused his assent, is to assert a proposition that finds no support in the facts and circumstances of the case. No doubt the defendant wanted this provision in the contract, but the terms and conditions of the sale had been settled before it was suggested, and it was manifestly intended as a possible safeguard against the result of misrepresentation rather than a bona fide condition of the sale."

The Washington Court also quotes from the case of *J. A. Fay etc., Company v. Independent Lumber Company*, 178 Ala. 166, 59 So. 470, in which Court, passing on the sufficiency of a complaint in a suit to cancel and rescind a contract of sale, used this language:

"If the complainant was fraudulently induced to enter into contract and to ex-

ecute the same, it would not, of course, be bound by any particular clause of same concluding it against setting up false and fraudulent representations within a proper * * * time. If the instrument was void for fraud in its execution, as alleged in the complainants' bill, it was of no more binding efficacy upon the complainant than if it had no existence, or were a piece of waste paper."

The only case mentioned by the Court reaching an apparent contrary conclusion was that of *Kreshover v. Berger*, 135 App. Div. 27, 119 N. Y. Supp. 737. That case however, is distinguishable from the other cases mentioned. In that case it was held that when the contract of sale provided that the lands were to be bought subject to a state of facts shown on a certain survey, it indicated an intention to rely on the survey as to boundaries and possible encroachments and was inconsistent with a claim that the plaintiff relied upon misrepresentations when making the contract.

In the last mentioned case it was not claimed that there was any fraud in inducing the claimant to rely upon the survey in question.

B.

NOTES OF IMPORTANT DECISIONS.

TEST FOR MENTAL INCAPACITY.—The Supreme Court of Iowa has recently held, in *Graham v. Clapp*, 184 N. W. 329, that the test of mental unsoundness involves the competency of a person to manage his or her property and business in a rational way; that unsoundness of mind justifying the appointment of a guardian or committee must be more than mere debility or impairment of memory, and that evidence to support a petition in incompetency proceedings must be clear and satisfactory.

The opinion is worth quoting from at length: "Plaintiffs are the daughters of the defendant, Leonard Clapp. The petition is predicated on Code section 3219, which provides that a guardian may be appointed for a person of unsound mind. Since the statute is silent as to the indicia of mental unsoundness, we must resort to judicial opinion and definition. It is not our purpose to set out in detail either the proof tendered in support of the allegations of

the petition or offered by the defendant in his attempt to prevent the appointment of a guardian. Each case of this character is necessarily bottomed upon its own facts and upon final decision constitutes a weak precedent.

"It appears that the defendant, Clapp, is a widower, 85 years of age; somewhat feeble in health, at times forgetful; weak in vision, and has been for many years; somewhat deaf and has been for twenty years past; that he sometimes talked to himself, which has been his custom for many years; that during the winter of 1918 he suffered some from rheumatism and perhaps diabetes. Conceding that he is subject to several physical and bodily infirmities that accompany old age, we must make answer to the pertinent inquiry whether these weaknesses and infirmities are such to warrant a finding that he is unsound in mind.

"The facts herein which disclose mental unsoundness and which would warrant a court in an appointment of a guardian of his property are quite meagre. His storekeeper, banker, and near neighbors vouch for his soundness of mind in business and social relations. It is well settled that the unsoundness of mind which will justify guardianship must be more than mere debility or impairment of memory. It must be such as to deprive the person of ability to manage his estate.

"It is not shown that any one has been attending to defendant's business; that he ever drove a bad bargain; that he has ever or is now squandering his property, or that he has ever dissipated his physical, mental or financial resources. It is stated by some witnesses that he acted childish, and that he was easily influenced, but no facts are stated upon which to base such conclusions.

"Some time prior to the institution of this suit the defendant deeded a farm costing \$7,000 to his son Dan for a consideration of \$5,600. A mortgage was executed by the son to the defendant for a balance of the purchase price at 5 per cent interest. Subsequently to this transaction the defendant on his own initiative canceled this mortgage, and another contract was executed whereby it was agreed by the son that he would pay his father the equivalent of the interest, or the sum of \$280, yearly, as long as he lived. The cancellation of this mortgage and the substitution of an unsecured contract may not have been the acme of wisdom on his part, but the defendant gave his reasons for so doing, and they are such as might be offered by a person mentally sound. It is quite apparent that the father, like many fathers, was partial to his son. But it is also quite apparent that this son was not a dominant influence in his life and business transactions. Furthermore the defendant thought with eight daughters living at the time of his death the pro rata share of this mortgage to the children would be so small that it did not warrant the continuation of the existence of the mortgage. He anticipated trouble. It also appears that the old gentleman had some misapprehension of the law governing the distribution of property, and the duties enjoined upon a father toward male heirs, but this in itself is not an indication of mental unsoundness. It is chargeable to ignorance or a mistaken notion of things.

"The occasional eccentric remarks of the defendant also cause counsel to comment, and it is urged as an indication of unsound mind. We are not so impressed. It is quite common for old people to say things in a manner different from those of the present generation. Their minds are reminiscent and their thoughts often find expression in the language of a bygone day.

"The real test of mental unsoundness involves the competency of a person to manage his property and business affairs in a rational way. If judgment and reason are dethroned to the extent that guidance by others is necessary in his ordinary business affairs, then a guardian should be appointed.

"The law of this case is well stated in *Emerick v. Emerick* (83 Iowa 411, 49 N. W. 1017, 13 L. R. A. 757). See, also, *Wood et al. v. Wood* (129 Iowa 255, 105 N. W. 517), *Garretson v. Hubbard* (110 Iowa 7, 81 N. W. 174).

"The recent case of *Overmyer et al. v. Overmyer et al.* (183 N. W. 582) is stronger on the facts than the instant record, but it was held that the evidence was insufficient to show mental incapacity of an 88-year old grantor at the time of the execution of the deed. Evidence in support of a petition alleging mental unsoundness must be clear and satisfactory, and not merely of that character which would cause a court to momentarily hesitate in its judgment.

"Upon a careful review of this record we cannot say that the defendant fails to act with judgment and discretion in his business affairs or that he is unable by reason of physical retrogression or mental decline to judiciously and personally continue to control the small estate which he now owns."

THE SPIRIT OF LAWLESSNESS.*

One of the most quoted—and also misquoted—Proverbs of the wise Solomon says, as translated in the authorized version: "Where there is no vision, the people perish." What Solomon actually said was: "Where there is no vision, the people cast off restraint." The translator thus confused an effect with a cause. What was the vision to which the Wise Man referred? The rest of the Proverb, which is rarely quoted, explains:

"Where there is no vision, the people cast off restraint; *but he that keepeth the law, happy is he.*"

*The address of Hon. James M. Beck, Solicitor General of the United States, before the American Bar Association meeting at Cincinnati, August 31, 1921. This address created much interest and provoked much discussion among the lawyers who attended the meeting.

The vision then, is the authority of law, and Solomon's warning is that to which the great and noble founder of Pennsylvania many centuries later gave utterance, when he said:

"That government is free to the people under it, where the laws rule and the people are a party to those laws; and all the rest is tyranny, oligarchy and confusion."

Conceding that lawlessness is not a novel phenomenon, has not the present age been characterized by an exceptional revolt against the authority of law? The statistics of our criminal courts show in recent years an unprecedented growth in crimes. Thus, in the Federal Courts, pending criminal indictments have increased from 9503 in the year 1912 to over 70,000 in the year 1921. While this abnormal increase is, in part, due to sumptuary legislation—for approximately 30,000 cases now pending arise under the prohibition statutes—yet, eliminating these, there yet remains an increase in nine years of nearly 400 per cent in the comparatively narrow sphere of the federal criminal jurisdiction. I have been unable to get the data from the state courts; but the growth of crimes can be measured by a few illustrative statistics. Thus, the losses from burglaries which have been repaid by casualty companies have grown in amount from \$886,000 in 1914 to over \$10,000,000 in 1920; and, in a like period, embezzlements have increased fivefold. It is notorious that the thefts from the mails and express companies and other carriers have grown to enormous proportions. The hold-up of railroad trains is now of frequent occurrence, and is not confined to the unsettled proportions of the country. Not only in the United States, but even in Europe, such crimes of violence are of increasing frequency, and a recent dispatch from Berne, under date of August 7, stated that the famous International Expresses of Europe were now run under a military guard.

The streets of our cities, once reasonably secure from crimes of violence, have now become the field of operations for the foot-

pad and highwayman. The days of Dick Turpin and Jack Shepherd have returned, with this serious difference—that the Turpins and Shepherds of our days are not dependent upon the horse, but have the powerful automobile to facilitate their crimes and make sure their escape.

In Chicago alone, 5000 automobiles were stolen in a single year. Once murder was an infrequent and abnormal crime. Today in our large cities it is of almost daily occurrence. In New York, in 1917, there were 236 murders and only 67 convictions; in 1918, 221, and 77 convictions. In Chicago, in 1919, there were 336, and 44 convictions.

When the crime wave was at its height a few years ago, the police authorities in more than one city confessed their impotence to impose effective restraints. Life and property had seemingly become almost as insecure as during the Middle Ages.

As to the subtler and more insidious crimes against the political state, it is enough to say that graft has become a science in city, state and nation. Losses by such misapplication of public funds—piled Pelion on Ossa—no longer run in the millions but the hundreds of millions. Our city governments are, in many instances, foul cancers on the body politic; and for us to boast of having solved the problem of self-government is as fatuous as for a strong man to exult in his health when his body is covered with running sores. It has been estimated that the annual profits from violations of the prohibition laws have reached \$300,000,000. Men who thus violate these laws for sordid gain are not likely to obey other laws, and the respect for law among all classes steadily diminishes as our people become familiar with, and tolerant to, wholesale criminality. Whether the moral and economic results overbalance this rising wave of crime, time will tell.

In limine, let us note the significant fact that this spirit of revolt against authority is not confined to the political state, and

therefore its causes lie beyond that sphere of human action.

Human life is governed by all manner of man-made laws—laws of art, of social intercourse, of literature, music, business—all evolved by custom and imposed by the collective will of society. Here we find the same revolt against tradition and authority.

In music, its fundamental canons have been thrown aside and discord has been substituted for harmony as its ideal. Its culmination—jazz—is a musical crime.

In the plastic arts, all the laws of form and the criteria of beauty have been swept aside by the futurists, cubists, vorticists, tactilists, and other æsthetic Bolsheviki.

In poetry, where beauty of rhythm, melody of sound and nobility of thought were once regarded as the true tests, we now have the exaltation of the grotesque and brutal; and hundreds of poets are feebly echoing the "barbaric yawp" of Walt Whitman, without the redeeming merit of his occasional sublimity of thought.

In commerce, the revolt is one against the purity of standards and the integrity of business morals. Who can question that this is pre-eminently the age of the sham and the counterfeit? Science is prostituted to deceive the public by cloaking the increasing deterioration in quality. The blatant medium of advertising has become so mendacious as to defeat its own purpose.

In the recent deflation in commodity values, there was widespread "welching" among business men who had theretofore been classed as reputable. Of course, I recognize that a far greater number kept their contracts, even when it brought them to the verge of ruin. But when in the history of American business was there such a volume of broken faith as a year ago?

In the greater sphere of social life, we find the same revolt against the institutions which have the sanction of the past. Laws which mark the decent restraints of print, speech and dress have in recent decades been increasingly disregarded. The very

foundations of the great and primitive institutions of mankind—like the family, the church, and the state—have been shaken. Nature itself is defied. Thus, the fundamental difference of sex is disregarded by social and political movements which ignore the permanent differentiation of social function ordained by God himself.

All these are but illustrations of the general revolt against the authority of the past—a revolt that can be measured by the change in the fundamental presumption of men with respect to the value of human experience. In all former ages, all that was in the past was presumptively true, and the burden was upon him who sought to change it. Today, the human mind apparently regards the lessons of the past as presumptively false—and the burden is upon him who seeks to invoke them.

Of greater significance to the welfare of civilization is the complete subversion during the World War of nearly all the international laws which had been slowly built up in a thousand years. These principles, as codified by the two Hague Conventions, were immediately swept aside in the fierce struggle for existence, and civilized man, with his liquid fire and poison gas and his deliberate attacks upon undefended cities and their women and children, waged war with the unrelenting ferocity of primitive times.

Surely, this fierce war of extermination, which caused the loss of three hundred billion dollars in property and thirty millions of human lives, did mark the "twilight of civilization." The hands on the dial of time had been put back—temporarily, let us hope and pray—a thousand years.

Undoubtedly, there are many contributing causes which have swollen the turbid tide of this world-wide revolution against the spirit of authority.

Thus, the multiplicity of laws does not tend to develop a law-abiding spirit. This fact has often been noted. Thus Napoleon, on the eve of the 18th Brumaire, complained

that France, with a thousand folios of law, was a lawless nation. Unquestionably, the political state suffers in authority by the abuse of legislation, and especially by the appeal to law to curb evils that are best left to individual conscience.

In this age of democracy, the average individual is too apt to recognize two constitutions, one, the constitution of the State, and the second, an unwritten constitution, to him of higher authority, under which he believes that no law is obligatory which he regards as in excess of the true powers of government. Of this latter spirit, the widespread violation of the prohibition law is a familiar illustration.

A race of individualists obey reluctantly, when they obey at all, any laws which they regard as unreasonable or vexatious. It has always flourished, and the so-called "best people" have not been innocent. Thus nearly all women are involuntary smugglers. They deny the authority of the state to impose a tax upon a Paquin gown. Again, our profession must sorrowfully confess that the law's delays and laxity in administration breed a spirit of contempt, and too often invite men to take the law into their own hands. These causes are so familiar that their statement is a commonplace.

Proceeding to deeper and less recognized causes, some would attribute this spirit of lawlessness to the rampant individualism which began in the eighteenth century, and which has steadily and naturally grown with the advance of democratic institutions. Undoubtedly, the excessive emphasis upon the rights of man, which marked the political upheaval of the close of the eighteenth and the beginning of the nineteenth century, has contributed to this malady of the age. Men talked, and still talk, loudly of their rights, but too rarely of their duties. And yet if we were to attribute the malady merely to excessive individualism, we would again err in mistaking a symptom for a cause.

To diagnose truly this malady we must look to some cause that is coterminous in

time with the disease itself and which has been operative throughout civilization. We must look for some widespread change in social conditions, for man's essential nature has changed but little; and the change must, therefore, be of environment.

I know of but one change in environment that is sufficiently widespread and deep-seated to account adequately for this malady of our time.

Beginning with the close of the eighteenth century, and continuing throughout the nineteenth, a prodigious transformation has taken place in the environment of man, which has done more to revolutionize the conditions of human life than all the changes that had taken place in the 500,000 preceding years which science has attributed to man's life on the planet. Up to the period of Watt's discovery of steam vapor as a motive power, these conditions, so far as the principal facilities of life, were substantially those of the civilization which developed eighty centuries ago on the banks of the Nile and later on the Euphrates. Man had indeed increased his conquest over nature in later centuries by mechanical inventions, such as gunpowder, telescope, magnetic needle, printing press, spinning jenny, and hand loom, but the characteristic of all those inventions, with the exception of gunpowder, was that they still remained a subordinate auxiliary to physical strength and mental skill of man. In other work, man still dominated the machine, and there was still full play for his physical and mental faculties. Moreover, all the inventions of preceding ages, from the first fashioning of the flint to the spinning wheel and the hand-lever press, were all conquests of the tangible and visible forces of nature. With Watt's utilization of steam vapor as a motive power, man suddenly passed into a new and portentous chapter of his varied history. Thenceforth, he was to multiply his powers a thousandfold by the utilization of the invisible powers of nature—such as vapor and electricity. This prodigious change in his powers, and therefore his environment, has proceeded with ever-ac-

celerating speed. Man has suddenly become the super-man. Like the giants of the ancient fable, he has stormed the very ramparts of Divine power, or, like Prometheus, he has stolen fire of omnipotent forces from Heaven itself for his use.

This almost infinite multiplication of human power has tended to intoxicate man. The lust for power has obsessed him, without regard to whether it be constructive or destructive. He consumes the treasures of the earth faster than it produces them, deforesting its surface and disemboweling its hidden wealth. As he feverishly multiplied the things he desired, even more feverishly he multiplied his wants. To gain these, he sought the congested centers of human life. And while the world, as a whole, is not over-populated, the leading countries of civilization were subjected to this tremendous pressure. Europe, which, at the beginning of the nineteenth century, barely numbered 100,000,000 people, suddenly grew nearly fivefold. Millions left the farms to gather into the cities to exploit their new and seemingly easy conquest over nature. In our own country, as recently as 1880, only 15 per cent of our people were crowded in the cities, 85 per cent remained upon the farms and still followed that occupation, which, of all occupations, still preserves, in its integrity, the dominance of human labor over the machine. Today, 52 per cent of our population is in the cities, and with many of them existence is both feverish and artificial. While they have employment, many of them do not themselves work, but spend their lives in watching machines work. The result has been a minute subdivision of labor that has denied to many workers the true significance and physical benefit of labor.

The direct results of this excessive tendency to specialization whereby not only the work but the worker becomes divided into mere fragments, are three fold. Hobson, in his work on John Ruskin, thus classifies them. In the first place, *narrowness*, due to the confinement to a single action in which the elements of human skill or

strength are largely eliminated; secondly, *monotony*, in the assimilation of man to a machine, whereby seemingly the machine dominates man and not man the machine, and, thirdly, *irrationality*, in that work became disassociated in the mind of the worker with any complete or satisfying achievement. The worker does not see the fruit of his travail, and can not therefore be truly satisfied. To spend one's life in opening a valve to make a part of a pin is, as Ruskin pointed out, demoralizing in its tendencies. The clerk who only operates an adding machine, has little opportunity for self-expression. Thus, millions of men have lost both the opportunity for real physical exertion, the incentive to work in the joyous competition of skill, and finally the reward of work in the sense of achievement.

The great indictment, therefore, of the present age of mechanical power is that it has largely destroyed the spirit of work. The great enigma which it propounds to us, and which, like the riddle of the Sphinx, we will solve or be destroyed, is this:

Has the increase in the potential of human power, through therodynamics, been accompanied by a corresponding increase in the potential of human character?

To this life and death question, a great French philosopher, Le Bon, writing in 1910, replied that the one unmistakable symptom of human life was "the increasing determination in human character," and a great physicist has described the symptom as "the progressive enfeeblement of the human will." In a famous book, "Degeneration," written at the close of the nineteenth century, Max Nordau, as a pathologist, explains this tendency by arguing that our complex civilization has placed too great a strain upon the limited nervous organization of man. A great financier once said of an existing financial condition that it was suffering from "undigested securities," and, paraphrasing him, is it not possible that man is suffering from undigested achievement

and that his salvation must lie in adaptation to a new environment, which, measured by any standard known to science, is a thousand-fold greater in this year of grace than it was at the beginning of the nineteenth century.

No one would be mad enough to urge such a retrogression as the abandonment of labor-saving machinery would involve. Indeed, it would be impossible; for, in speaking of its evils, I freely recognize that not only would civilization perish without its beneficial aid, but that every step forward in the history of man has been coincident with, and in large part attributable to, a new mechanical invention. But suppose the development of labor-saving machinery should reach a stage where all human labor was eliminated, what would be the effect on man? The answer is contained in an experiment which Sir John Lubbock made with a tribe of ants. Originally the most voracious and militant of their species, when denied the opportunity for exercise and freed from the necessity of foraging for their food, in three generations they became anaemic and perished. Take from man the opportunity of work and the sense of pride in achievement and you have taken from him the very life of his existence. Robert Burns could sing as he drove his plowshare through the fields of Ayr. Today millions, who simply watch an automatic infallible machine, which requires neither strength nor skill, do not sing at their work but too many curse the fate, which has chained them like Ixion to a soulless machine.

The evil is even greater.

The specialization of our modern mechanical civilization has caused a submergence of the individual into the group or class. Man is fast ceasing to be the unit of human society; self-governing groups are becoming the new units. This is true of all classes of men, the employer as well as the employee. The true justification for the anti-monopoly statutes,

including the Sherman anti-trust law, lies not so much in the realm of economics as in that of morals. With the submergence of the individual, whether he be capitalist or wage earner, into a group, there has followed the dissipation of moral responsibility. A mass morality has been substituted for individual morality, and, unfortunately, group morality generally intensifies the vices more than the virtues of man.

Of all this, the nineteenth century, in its exultant pride in its conquest of the invisible forces, was almost blind. It not only accepted progress as an unmistakable fact—mistaking, however, acceleration and facilitation for progress—but in its mad pride believed in an immutable law of progress which, working with the blind forces of machinery, would propel man forward. A few men, however, standing on the mountain ranges of human observation, saw the future more clearly than did the mass. Emerson, Carlyle, Ruskin, Samuel Butler, and Max Nordau, in the nineteenth century, and, in our time, Ferrero, all pointed out the inevitable dangers of the excessive mechanization of human society. Their prophecies were unhappily as little heeded as those of Cassandra.

One can see the tragedy of the time, as a few saw it, in comparing the first Locksley Hall of Alfred Tennyson, written in 1827, with its abiding faith in the "increasing purpose of the ages" and its roseate prophecies of the golden age when the "war-drum would throb no longer and the battle flags be furled in the Parliament of Man and the Federation of the World," and the later Locksley Hall, written 60 years later, when the great spiritual poet of our time gave utterance to the dark pessimism which flooded his soul:

"Gone the cry of 'Forward, Forward,' lost within a growing gloom;

Lost, or only heard in silence from the silence of a tomb.

Half the marvels of my morning, triumphs over time and space,
Staled by frequency, shrunk by usage, into commonest commonplace!

Evolution ever climbing after some ideal good,

And Reversion ever dragging Evolution in the mud.

Is it well that while we range with Science, glorying in the Time,

City children soak and blacken soul and sense in city slime?"

I must seem to be unduly pessimistic. I fear that this is the case with most men who, like Dante, have crossed their fiftieth year and find themselves in a "dark and sombre wood." You will probably subject me to the additional reproach that I suggest no remedy. There are many palliatives for the evils which I have discussed. To rekindle in men the love of work for work's sake and the spirit of discipline, which the lost sense of human solidarity once inspired, would do much to solve the problem, for work is the greatest moral force in the world. But I must frankly add that I have neither the time nor the qualifications to discuss the solution of this grave problem.

If we of this generation can only recognize that the evil exists, then the situation is not past remedy; for man has never yet found himself in a blind alley of negation. He is still "captain of his soul and the master of his fate," and, to me, the most encouraging sign of the times is the persistent evidence of contemporary literature that thoughtful men now recognize that much of our boasted progress was as unreal as a rainbow. While the temper of the times seems for the moment pessimistic, it merely marks the recognition of man of an abyss whose existence he barely suspected but over which his indomitable courage will yet carry him.

But what can the law and our profession do in this warfare against the blind forces of nature.

It is easy to exaggerate the value of all political institutions; for they are gen-

erally on the surface of human life and do not reach down to the deep undercurrents of human nature. But the law can do something to protect the soul of man from destruction by the soulless machine.

It can defend the spirit of individualism. It must champion the human soul in its God-given right to exercise freely the faculties of mind and body. We must defend the right to work against those who would either destroy or degrade it. We must defend the right of every man not only to join with others in protecting his interests, whether he is a brain worker or a hand worker—for without the right of combination the individual would often be the victim of giant forces—but we must vindicate the equal right of an individual, if he so wills, to depend upon his own strength.

The tendency of group morality to standardize man—and thus reduce all men to the dead level of an average mediocrity—is one that the law should combat. Its protection should be given to those of superior skill and diligence, who ask the due rewards of such superiority. Any other course to use the fine phrase of Thomas Jefferson in his first inaugural, is to “take from the mouth of labor the bread it has earned.”

Of this spirit of individualism, the noblest expression is the Constitution of the United States. That institution has not wholly escaped the destructive tendencies of a mechanical age. It was framed at the very end of the pastoral-agricultural age and at a time when the spirit of individualism was in full flower. The hardy pioneers who, with their axes, made straight the pathway of an advancing civilization, were sturdy men who need not be undervalued to us of the mechanical age. The prairie schooner, which met the elemental forces of nature with the proud challenge: “Pike’s Peak or bust,” produced as fine a type of manhood as the age which travels either in Mr. Ford’s “flivver” or the more luxurious Rolls-Royce.

The Constitution was framed in the period that marked the passing of the primitive age and the dawn of the day of the machine. Watt had discovered the potency of steam vapor as a motive power; but its only use, as known to the fathers, was for pumping water out of the mines. When the framers of the Constitution met in high convention in Philadelphia in the summer of 1787, a Connecticut Yankee, John Fitch, was then also working in Philadelphia upon his steam boat; but twenty years were to pass before the prow of the “Clermont” was to part the waters of the Hudson, and nearly a half century before transportation was to be revolutionized by the utilization of Watt’s invention in the locomotive. Of the wonders of the steamship, the railroad, the telgraphic cable, the wireless, the gasoline engine, and a thousand other mechanical miracles, the fathers did not even dream.

It is not surprising that this epoch-making change in human power, which has so profoundly and destructively transformed social conditions, has not been without its effect upon the Constitution of 1787. Steam and electricity have disturbed the nice equilibrium between the nation and the states, which the fathers intended to endure for all time. In this respect, if they could revisit “the glimpses of the moon,” they would, in some respects, find difficulty in recognizing their own handiwork. Even Alexander Hamilton might be amazed in seeing that the Federal Government, now one of the most powerfully unified states of the world, has by the direct, and especially the indirect, exercise of its powers so largely invaded the reserved powers of the states. The mechanical civilization has greatly modified the dual character of our Government.

If, however, in this respect, the Constitution has proven little more than a sandy beach, which the tidal waves of elemental forces have slowly eroded, yet we can proudly claim that in another and more

important respect the Constitution has withstood the ceaseless washing of the waves of changing circumstances, as the Rock of Gibraltar itself.

The greatest and noblest purpose of the Constitution was not alone to hold in nicest equipose the relative powers of the nation and the states, but also to maintain in the scales of justice a true equilibrium between the rights of government and the rights of an individual. It does not believe that the state, much less the caprices of a fleeting majority, is omnipotent, or that it has been sanctified with any oil of anointing, such as was once assumed to give to the monarch infallibility. About the individual, the Constitution draws the solemn circle of its protection. It defends the integrity of the human soul.

In other governments, these fundamental decencies of liberty rest upon the conscience of the legislature. In our country they are part of the fundamental law, and, as such, enforceable by judges sworn to defend the integrity of the individual as fully as the integrity of the state. Therefore, the greatest service that the Bench and Bar can render in combating the evils of a mechanical age is to defend and preserve in its full integrity the Constitution of our fathers.

That Constitution was their "vision." And when did a nobler one ever inspire men in the political annals of mankind? Without that vision to restrain each succeeding generation of Americans from the tempting excesses of political power, the American Commonwealth, with its great heterogenous democracy, might conceivably perish.

Thank God, that vision still remains with the American people and still leads them to ever higher achievements, for in all the mad changes of a frenzied hour, the American people has not yet lost faith in or love for the Constitution of the fathers! That vision will remain with us

as long, and no longer, as there is in the hearts of the American people a conscious and willing acquiescence in its wisdom and justice. Obviously, it can have no inherent vigor to perpetuate itself. If it ceases to be of the spirit of the people, then the yellow parchment whereon it is inscribed can avail nothing. When that parchment was last taken from the safe in the State Department, the ink, in which it had been engrossed nearly 134 years ago, was found to be faded. We must write the compact, not with ink upon parchment, but with "letters of living light"—to use Webster's phrase—upon the hearts of our people.

Let us, then, as its interpreters and guardians, and, as such, the civilian soldiers of the state, do all that in us lies to preserve this inspired vision of the Fathers; for again the solemn warning of the wise man of old recurs to us:

"Where there is no vision, the people perish; but he that keepeth the law, happy is he."

JAMES M. BECK.

HIGHWAYS—TESTIMONY AS TO SPEED PRIOR TO COLLISION.

TRAYNOR v. McGILVRAY.

200 Pac. 1056.

(District Court of Appeal, First District, Division 1, California. Aug. 17, 1921. Hearing Denied by Supreme Court, Oct. 13, 1921.)

Testimony of witnesses as to the speed and manner of operation of an automobile within 500 or 600 feet of the point of collision with another car a few seconds later and near enough to hear the sound, though they did not see the impact, did not relate to conditions at prior times and other places, so as to bring it within the rule against remoteness.

RICHARDS, J. This appeal is from a judgment based upon a verdict in favor of the defendant in an action for damages for personal injuries received by the plaintiff as the result of a collision between the automobiles of the respective parties, which occurred on the afternoon of January 18, 1917, upon the state highway, between Burlingame and Millbrae, in San Mateo County.

The defendant was driving his car, a sedan, southward from San Francisco on his way to San Jose. The plaintiff was driving her car, also a sedan, northward from Burlingame on the way to San Francisco. A short distance ahead of her was a wagon, and just behind it another car, a Metz, both proceeding northward. The Metz car turned outward toward or upon the center of the road in order to pass the wagon, and the plaintiff at or about the same moment attempted to pass both the wagon and the Metz car. The approaching defendant first observed the wagon and the cars behind it when about 500 feet away, and saw the Metz car turn outward in its attempt to pass the wagon; but, according to the defendant's assertion, did not observe the plaintiff's effort to pass both the Metz car and the wagon until so short a distance away as to render a collision between his own car and the car of the plaintiff inevitable. The testimony is quite conflicting as to the respective speeds and also as to the precise position of the automobiles of the respective parties at and immediately before the time of the collision; but the evidence is practically conclusive that at the precise moment of collision the plaintiff's car was upon the left side of the highway, and the defendant's car was well over toward the edge of that side of the highway and in the dust of that portion thereof which was unbituminized. The jury returned its verdict in favor of the defendant.

The appellant's first contention upon this appeal is that the trial court committed reversible error in its admission in evidence of the testimony of two witnesses, Mrs. Margaret Warner and her daughter, Miss Elsie L. Warner, called by the defendant. The testimony of these two witnesses was to the effect that they were standing by the side of the highway a short distance north of Burlingame and about the distance of a city block away from the point of collision, which point, however, they were unable to see for the reason that there is a slight elevation in the road between their points of vision and the point of impact. They were near enough, however, to hear the sound of such impact, and their testimony to which the plaintiff's objection went was to the effect that at the time the plaintiff passed the point where they were standing and went on up the incline in the road her car was driven very rapidly and, as the witnesses described it, "was running from one side of the road to the other, zigzagging across the road." The plaintiff objected to the defendant's offer to make this proof, and also objected to the witnesses' tes-

timony when presented, upon the ground that it was too remote for the reason that it referred to the conduct of the plaintiff and the action of her car at a time prior to and at some considerable distance from the point of collision, which point was beyond the witnesses' visions.

We think that this objection was not well taken. The question of the remoteness of evidence which is offered with relation to the actions and conduct of a party, particularly as to the rate of speed and method of driving an automobile just before a collision occurs, is one which rests so largely within the discretion of the trial court that no positive rule upon the subject can be laid down, and for that reason the ruling of the trial judge as to the admission or rejection of that sort of evidence will not be disturbed except upon a clear showing of an abuse of such discretion. 1 Wigmore on Evidence, 514 et seq.; *Olsen v. Levy*, 8 Cal. App. 487, 97 Pac. 76; *Bauhofer v. Crawford*, 16 Cal. App. 676, 117 Pac. 931; *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706; *Dilger v. Whittier*, 33 Cal. App. 15, 164 Pac. 49.

We do not regard it as significant that these witnesses did not actually see the impact of the machines, since they were within 500 or 600 feet of the point of impact, which occurred within a few seconds after the existence of the conditions which they related, and near enough for the sound of the impact to reach their ears. Their testimony did not, therefore, relate to conditions at prior times and other places so as to bring it within the range of the cases which the appellant cites as supporting her contention.

We find no error in this record.

Judgment affirmed.

NOTE—Admissibility of Evidence as to Rate of Speed Other Than at Place and Time of Accident.—Where a boy was run down near a culvert, and defendant testified that he slowed down for the culvert, testimony that the machine was moving 25 miles an hour when 90 feet from the culvert was admissible; it being shown that the machine, after turning to avoid the boy, skidded across the road and hit a wire fence hard enough to upset a heavy fence post. *La Duke v. Dexter*, Mo. App., 202 S. W. 254 (1918).

It was held proper to admit evidence of a high rate of speed of an automobile, which struck a crossing watchman, one and a half blocks before reaching the place of the accident, as affording an inference with respect to its probable rate of speed at the place of the accident. *Davis v. Barnes Ala.*, 77 So. 612 (1917), citing as authority *Louisville & N. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41.

Evidence of high speed a mile and a half or two miles from the place of accident was held to

be admissible, there being other evidence of high speed at the time of the accident. *Wellman v. Mead*, Vt., 107 Atl. 396 (1919).

Testimony as to the rate of speed of defendant's automobile a mile before reaching the place of accident, was admissible where there was testimony that the rate of speed was not diminished between the point in question and the place of accident. *Tyrrell v. Goslant*, Vt., 106 Atl. 585 (1919).

It was held competent for a witness to testify as to the rate of speed of the automobile in question four blocks from the place of the accident, where, there was testimony to show, the speed was excessive. *Wigginton's Adm'r v. Rickert*, Ky., 217 S. W. 933 (1920).

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION, COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 201.

Partnership—Between lawyer and certified public accountant for practice of public accounting and tax report service; Professionally improper.—In the opinion of the committee is there any professional impropriety on the part of a lawyer entering into the formation of a partnership with a certified public accountant for the practice of public accounting and tax report service?

ANSWER No. 201.

A majority of the Committee is of the opinion that the implication of the arrangement and of the question is that the partnership furnishes the legal services of the lawyer to its customers; they consider that such exploitation of professional services for the profit of or by those who are not entitled to practice law (in whatever guise cloaked) is not professionally proper, because it admits to the emoluments of the office those who are not entitled to its privileges or bound by its discipline or amenable to summary correction, and affords an opportunity to the layman to give legal advice.

LITERARY LIBEL

The publication of a supposedly fictitious narrative in good faith by a publisher of books was held in *Corrigan v. Publishing Co.*, 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662, not

to be a complete justification to an action for malicious libel contained in the book, even though the publisher was unaware of the existence of the person libeled, or that the libel was written of and concerning any existing person; that is, it was held that such facts were no defense to the recovery of compensatory damages, but that they might prevent the recovery of punitive damages by disproving actual malice, which must be shown to recover such damages. The court in this case said: "The fact that the publisher has no actual intention to defame a particular man, or, indeed, to injure anyone, does not prevent recovery of compensatory damages by one who connects himself with the publication; at least, in the absence of some special reason for a positive belief that no one existed to whom the description answered. The question is not so much who was aimed at, as who was hit."

The few cases which have discussed this question are in conflict, but the weight of authority seems to support the rule enunciated in the preceding case, that the publisher's ignorance of the writer's intention to libel, or of the libelous character of the article, is not a defense to his liability therefor. Thus, the publisher's ignorance that the book contained libelous matter is held in *Curtis v. Mussey*, 6 Gray, 261, to be no defense to an action for libel against a publisher of a book composed of the letters and speeches of a prominent man upon a public question, since the publisher was bound to know whether the publication contained libelous matter. And one who publishes without malice, a libelous pamphlet on a privileged occasion, is held jointly liable with the writer of the pamphlet, in *Smith v. Streatfield* (1913), 3 K. B. 764, 82 L. J. K. B. N. S. 1237, 109 L. T. N. S. 173, 29 Times L. R. 707, where the latter was actuated by malice; since the latter's malice defeats the privilege also for the publisher.

It is stated in *Thompson v. Powning*, 15 Nev. 195, that proprietors of newspapers are not to be relieved from any liability on account of any ignorance, inadvertence, or thoughtlessness on their part, as to matters published. But it was held in *Smith v. Ashley*, 11 Met. 367, 45 Am. Dec. 216, that the publisher of a newspaper was not liable for a libelous article therein, where he did not know to whom the article applied, and supposed that it was a mere fancy sketch or fictitious story, although the writer intended the article to be libelous, and to apply to the plaintiff. The court said

that, to charge the defendant, it must be proved that he published the libel wrongfully and intentionally, and without any just cause or excuse.

In the case first cited, the Court remarks: "Publishers cannot be so guileless as to be ignorant of the trade risk of injuring others by accidental libels. Works of fiction not infrequently depict as imaginary, events in courts of justice or elsewhere actually drawn or distorted from real life. Dickens, in 'Pickwick Papers,' has a well-known court scene of which Mr. Sergeant Ballantine says in his 'Experiences' that Mr. Justice Gazelee 'has been delivered to posterity as having presided at the famous trial of Bardell v. Pickwick. I just remember him, and he certainly was deaf.' Goldwin Smith, the distinguished historian and publicist, said of Disraeli's veiled attack upon him as the 'Oxford professor' in the novel 'Lothair' ('Reminiscences,' p. 171): 'He afterwards pursued me across the Atlantic, and tried to brand me, under a perfectly transparent pseudonym, if "Oxford professor" could be called a pseudonym at all, as a "social sycophant." There is surely nothing more dastardly than this mode of stabbing a reputation.' The power of Charles Reade's descriptions of prison life in 'It's Never Too Late to Mend,' and the abuses of private insane asylums in 'Hard Cash,' is undeniable, although the truth of some of his details was challenged. The novel of purpose, such as 'Uncle Tom's Cabin,' often deals with incidents and individuals not wholly imaginary. Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest."

HUMOR OF THE LAW.

A speculation on the stock exchange was sitting in a friend's office, and during the conversation, which was mostly about stocks and bonds, he informed his friend that he had picked up a thing during the winter.

"It stood at 84 then, and yesterday it touched 84!" he said.

"By Jove! You are lucky. What is it?" asked his friend.

"A thermometer," was the reply.—*Pittsburgh Chronicle-Telegraph*.

A negro who had an injured head entered a doctor's office

"Hello, Sam! Got cut again, I see."

"Yes, sah! I done got carved up with a razor!"

"Why don't you keep out of bad company?" said the physician, after he had dressed the wound.

"'Deed I'd like to, but I ain't got 'nuff money to git a divorce."

"There was a stir in court when the fair defendant got on the witness stand."

"I suppose the gentlemen of the jury slicked down their hair and fumbled with their neckties?"

"Not only that, but one bailiff whispered to another bailiff that if he had known such a queen was to be about the premises he would have had his trousers pressed for the first time in seven years at the eminent risk of making his wife suspect he was leading a double life."—*Birmingham Age-Herald*.

W. J. Bryan's father once missed several large hams that had been hanging in his barn loft. He suspected that the thief did not live many miles away, but he made no direct charge against any one; in fact, he refrained from mentioning his loss to a single soul. A few days later his neighbor called. "Say, judge," said the man, "I heard you had some hams stole the other night." "Yes," replied the judge very confidentially, "but don't tell any one. You and I are the only ones who know about it."

A traveling salesman driving his car along a country road came upon a victim of a grade-crossing accident. The car was a complete wreck and its former occupant just "coming to." He leaned over the injured man and shook him.

"What's the matter, brother, an accident?"

"Yes."

"Did the engineer blow his whistle?"

"No."

"Did anyone see it?"

"No."

"Well, tell me, has the claim agent been around yet?"

"No."

"Then, for heaven's sake, move over and let me lie down!"—*Los Angeles Times*.

"Why was he pinched?"

"His father let him use his motor car for an hour."

"Well?"

"He tried to ride an hour in 15 minutes!"—

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Animals—Death From Serum.**—In an action for death of hogs vaccinated with serum manufactured by defendant, plaintiff, by showing that the serum was properly administered and that the malignant edema causing death developed at the place where the serum was injected, established a prima facie case, which the defendant could rebut by showing that the serum had been prepared according to the approved method and carefully prepared and properly tested, bottled, sealed, and labeled, and that all reasonable care had been exercised to exclude poisonous or deleterious matter.—*Murphy v. Sioux Falls Serum Co., S. D., 184 N. W. 252.*

2. **Vicious Dog.**—One who knowingly harbors a vicious dog which, while running at large frightens a team of horses lawfully on the highway, causing it to run away and injure the owner, who departs from a place of safety to stop it, is liable to such owner, if his injuries resulted proximately from the dog's act, which is for the jury; the owner in such circumstances not being necessarily guilty of contributory negligence.—*Dougherty v. Reckler, Iowa, 184 N. W. 304.*

3. **Automobiles—Duty of Driver.**—It is the duty of the driver of an automobile, before turning into a crossing street, not only to look for cars approaching thereon, but to look in such an intelligent and careful manner as will enable him to see the things which a person, in the exercise of ordinary care and caution, for his own safety and the safety of others, would have seen under like circumstances.—*Bramley v. Dilworth U. S. C. C. A., 274 Fed. 267.*

4. **Negligence of Driver.**—Laws 1919, c. 267, § 1, requiring automobile driver to grant the right of way at the street intersection to an automobile approaching from his right, does not apply where the driver to the left turns to his right into intersecting street as near the right-hand boundary of the road as possible, as required by such statute, since in such case he does not interfere with the driver approaching the intersection from his right, and who in approaching the intersection should be driving on the right-hand side of the street.—*Mills v. Dakota Power Co., S. D., 184 N. W. 261.*

5. **Bankruptcy—Composition.**—Under Bankruptcy Act, § 48d (Comp. St. §9632 [d]), providing that on confirmation of a composition the commissions allowed a receiver or marshal shall not exceed one-half of 1 per centum of the amount to be paid creditors, and § 72 (Comp. St. § 9556), providing that "neither the referee receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation

for his services than that expressly authorized and prescribed in this act," a court is without power to confirm a composition which provides for compensation of a receiver in a sum largely in excess of that prescribed in § 48d.—*In re Sol Gross & Co., U. S. D. C., 274 Fed. 741.*

6. **Form of Pleading.**—Where a court of bankruptcy has jurisdiction of a plenary suit by a trustee, the fact that he proceeds by petition as for a summary order is immaterial, if the parties appear and there is a full hearing on the merits, and in such case the proceeding will be treated as a plenary suit.—*In re Eilers Music House, U. S. C. C. A., 274 Fed. 330.*

7. **Banks and Banking—Liability of Express Company.**—Where a contract with an express company for the transmission of money provided that it was not to be responsible for loss occasioned by errors or delays of its correspondents, it is not liable for loss in value of foreign money, caused by the delay of its correspondent in Europe, if there was such delay.—*Sommer v. Taylor, N. Y., 190 N. Y. S. 153.*

8. **Ultra Vires Contract.**—A state bank commissioner, in behalf of the creditors of an insolvent state bank, brought suit against another bank to recover collateral pledged for a loan which created an indebtedness in excess of that permitted by the statutes of the state, but authorized by formal action of the directors. Pending the suit, the directors, who were liable under the statute for any indebtedness of the bank created by them in violation of law, paid to the commissioner the amount of the bank's indebtedness, and took from him an assignment of its assets. Held, that the suit could no longer be maintained for their benefit, either in their own names or in that of the commissioner.—*Lewis v. Fifth-Third National Bank of Cincinnati, U. S. C. C. A., 274 Fed. 587.*

9. **Bills and Notes—Holder in Due Course.**—Where newly organized corporation caused note for purchase money of stock to be executed to another corporation, from whom it was purchasing a mill, to apply on purchase price of such mill, other corporation was not a "holder in due course," under Negotiable Instruments Law, § 52, since a holder in due course must have acquired the note by negotiation and transfer from the payee or a prior indorsee, and not by issue or delivery from the maker.—*Britton Milling Co. v. Williams, S. D., 184 N. W. 265.*

10. **Carriers of Live Stock—Negligence.**—Having regard to the inherent nature and propensity of mules, the mere fact that several individuals of a carload got down in the car and suffered injuries does not authorize a finding of negligence on the part of the carrier; the rule of *res ipsa loquitur* not applying.—*Atlantic Coast Line R. Co. v. J. S. Carroll Mercantile Co., Ala., 89 So. 509.*

11. **Champerty and Maintenance—Contract Between Attorney and Client.**—A contract between attorney and widow concerning an action by the widow as administrator against a railroad for damages for husband's death held champertous and void, as being prepared with a design on part of attorney to put whole litigation and whole estate of the dead man in his custody and control, and to place the widow wholly within his power, and subject to his dictation, and requiring mutual consent of attorney and widow to compromise with railroad.—*Proctor v. Louisville & N. R. Co., Ky., 233 S. W. 736.*

12. **Commerce—Imports.**—Laws Wash. 1915, p. 274, as supplemented by Laws 1919, p. 290, requiring eggs imported from foreign countries and offered for sale in the state to be sold as such, and to that end that each imported egg shall be marked, branded, or stamped with the name of the country in which it was produced, and that broken eggs or those offered for sale in other than the original form shall be similarly designated by marks on the containers or packages, but which exact no license fee and place no restrictions on dealings in or use of such eggs, held not unconstitutional, as imposing a restraint on foreign commerce, but within the police power of the state, and valid.—*Amos Bird Co. v. Thompson, U. S. D. C., 274 Fed. 702.*

13.—**Interstate.**—An employee, injured while directing the moving of a coal car from one point to another in a yard connected with the shops of a sleeping car company by which he was employed, was not engaged in interstate commerce within Workmen's Compensation Law 1917, § 142, providing that such article should not apply to employees so engaged where the laws of the United States provide for compensation for such injury.—*Pullman Car Lines v. Riley*, Del., 114 Atl. 920.

14.—**Constitutional Law—Divorce.**—Code 1907, § 3795, as amended by Gen. Acts 1919, p. 878, does not deny due process of law or equal protection of the law in violation of Const. U. S. Amend. 14, in authorizing the wife to sue for and obtain a divorce because of a status of separation and nonsupport, for which the husband may not have been responsible either as to its origin or continuation, and does not permit the husband to likewise sue for divorce.—*Barrington v. Barrington*, Ala., 89 So. 512.

15.—**Contracts—Breach of.**—Where defendant contracted that plaintiff, in return for raising the bid on land, should receive a share of higher bids, and the latter, after making a higher bid, to prevent a still higher one sold his own to the person intending to raise the bid, he is guilty of breach of contract, and cannot recover the stipulated share.—*Jennings v. Jennings*, N. C., 108 S. E. 840.

16.—**Mutuality.**—A contract requiring the seller to deliver goods on buyer's order, which was void for want of mutuality for failure to obligate buyer to order such goods, became a valid contract on buyer's order of the goods, since by ordering the goods buyer bound himself to accept and become liable therefor.—*McCaull-Dinsmore Co. v. Heyler*, S. D., 184 N. W. 243.

17.—**Specific Performance.**—Where a land sale contract did not make time of the essence in perfecting title, and no change of circumstances had occurred at the time of filing a release of judgment subsequent to the closing of title, held, that the release would cure the objection as to the judgment being a lien on the land, in an action involving specific performance.—*Joseph Loria, Inc. v. Stanton Co.*, N. Y., 190 N. Y. S. 131.

18.—**Corporations—Foreign Corporations.**—Though a sale of stock through an agent was subject to approval by the company at its home office in another state, the negotiation of the contract and the acceptance of a note for the purchase price in Alabama constituted the business of selling stock therein within Code 1907, §§ 3651-3653, denouncing as void all contracts made in that state by foreign corporations without having first procured a permit by paying a franchise tax, as required by Code 1907, § 3647.—*Langston v. Phillips*, Ala., 89 So. 523.

19.—**Foreclosure.**—Where, in a suit by a bondholder to enforce a mortgage, in which all other bondholders were permitted to intervene, on recovery, the total amount due to all bondholders was paid into court, such fund is not a common fund, but belongs to the bondholders, severally and in proportion to their holdings, and where the holders of some of the bonds have not appeared and the bonds have not been found, the other bondholders have no claim to the part of the fund apportioned to them.—*Brown v. Pennsylvania Canal Co.*, U. S. D. C., 274 Fed. 467.

20.—**Interstate Business.**—Although a foreign corporation is guilty of carrying on business within the state without complying with the statutes, it is not precluded by this from suing in the state courts on a contract constituting interstate business.—*Lloyd Thomas Co. v. Grosvenor*, Tenn., 233 S. W. 669.

21.—**Insolvency.**—Equity will not entertain a stockholder's suit merely to redress fraud of the directors, if the fraud has produced insolvency, as it should then wind up the company.—*O'Brien v. Lashar*, U. S. C. C. A., 274 Fed. 326.

22.—**Customs Duties—Contraband Articles.**—The master of a vessel is not subject to the penalty imposed by Rev. St. § 2809, for bringing into the United States merchandise not shown on his manifest because of the landing from his vessel of smoking opium, not shown in the manifest, and the importation of which is pro-

hibited by Act Feb. 9, 1909.—*United States v. Reed*, U. S. D. C., 274 Fed. 724.

23.—**Divorce—Interest of State.**—The state has sufficient interest in a divorce case, regardless of lack of diligence in presenting evidence on the part of the defendant, to cause a decree of divorce obtained by deceit and wrongful acts of plaintiff's agents to be set aside on motion for a new trial.—*Beauley v. Beauley*, N. Y., 190 N. Y. S. 129.

24.—**Easement—Easement by Implication.**—Where the owner of an entire tract of land, or of two or more adjoining parcels, employs a part so that one derives from the other a benefit or advantage of a visible, continuous, apparent, and permanent nature, and sells the parcel in favor of which the easement exists, such easement, being necessary to the reasonable enjoyment of the property granted, and being appurtenant to it, will pass to the grantee by implication, though not expressly granted, which is true, also, within certain limitations, as to the reservation of such an easement.—*Garvin v. State*, N. Y., 190 N. Y. S. 143.

25.—**Electricity—Rates.**—Assuming that under Rev. St. Neb. 1913, § 4954, a city is authorized to contract with an electric light and power company concerning the rates to be charged, it cannot make a contract precluding it from increasing or reducing rates during the life of the contract, in view of § 4955, authorizing cities to regulate such rates and providing that such power shall not be abridged by ordinance, resolution, or contract.—*Central Power Co. v. City of Kearney*, U. S. C. C. A., 274 Fed. 253.

26.—**Eminent Domain—Trespass.**—A railroad company, entering on land outside of its right of way, removing soil therefrom, and causing a direct injury to plaintiff's mill by blasting stones into the river and changing the flow of the water so as to drown the mill, is liable irrespective of negligence.—*Louisville & N. Co. v. Craft*, Ky., 233 S. W. 741.

27.—**Value of Land.**—In ascertaining the compensation to be given for land taken for uses of forest preserve district, it must be estimated for the land as land with all its capabilities, and if there is timber on it, or coal, oil, or other minerals under the surface, they are to be considered so far as they affect the value of the land, but they cannot be valued separately, and it is not proper to admit evidence of what can be realized by separating timber from the land as personal property.—*Forest Preserve Dist. v. Caraher*, Ill., 132 N. E. 211.

28.—**Executors and Administrators—Fiduciary Relation.**—Where a fiduciary relationship existed between an aged widow and the executor of her husband's estate, the burden rested on the executor to show that the transaction by which she withdrew her renunciation of her husband's will and election to take under the statute and deeded her rights in her husband's property to the executor was entered into with her full knowledge of its nature and effect and was the result of her deliberate intelligent desire, and for her benefit.—*Lipscomb v. Allen*, Ill., 132 N. E. 206.

29.—**Homestead—Mortgage.**—In determining the value of a homestead estate a prior existing mortgage executed by both husband and wife should not be deducted.—*First Nat. Bank v. Hallquist*, N. D., 184 N. W. 269.

30.—**Insurance—Cancellation of Policy.**—An alleged cancellation of a policy of insurance on which suit is brought is an affirmative defense, and must be specially pleaded and proved, and the answer must allege the facts upon which the pleader relies as constituting cancellation.—*Van Scoy v. National Fire Ins. Co.*, Iowa, 184 N. W. 306.

31.—**Insurable Interest.**—Each member of a partnership has an insurable interest in the life of every other member, and an undertaking of an insurance company to pay death loss upon any life to surviving members of firm is legitimate.—*Fleming v. Fleming*, Iowa, 184 N. W. 296.

32.—**Military Service.**—Where insured was inducted into military service, and went to military camp to prepare himself for training.

and was granted a leave of furlough until midnight, upon which he left the camp on an auto-cycle and was killed in a collision with an automobile, the accident resulting in his death was not a risk of military service, within the meaning of a provision in the policy that such service in time of war without a permit from the company was not a risk assumed; a "furlough" being a leave given to an officer or soldier to be "absent from service" for a certain time.—*Atkinson v. Indiana Nat. Life Ins. Co., Ind.*, 132 N. E. 263.

35. **Intoxicating Liquors**—Admissibility of Evidence.—In prosecution for making intoxicating liquor, exclusion of testimony as to authorship of letter giving federal prohibition enforcement officer information as to the location of a still held proper as against contention that defendant was entitled to ascertain who his enemies were; the authorship of the letter being immaterial.—*Benson v. State, Ark.*, 233 S. W. 758.

36. **Transfer of License**—Transferee, having sold whiskey under a retail liquor license for six months, was not by reason thereof estopped from asserting that the transfer, not having been made in compliance with statutes prescribing conditions precedent, was void as against public policy and for want of a legal consideration.—*Green Bros. Co. v. McLain, Ala.*, 89 So. 509.

37. **Use of Automobile**—In proceedings by the state to condemn automobile for illegal transportation of prohibited liquor under Gen. Acts 1919, p. 13, § 13, opposed by mortgagee of automobile, proof that the automobile has been used or is being used for the illegal conveying of prohibited liquor from one point in a city to another establishes a prima facie case shifting the burden on the mortgagee to reasonably satisfy the court that she had no notice or knowledge of the unlawful use of the car at the time of the execution of the mortgage, and could not by the exercise of reasonable diligence have obtained such knowledge or notice thereof afterwards in time to have prevented such illegal use.—*State v. Farley, Ala.*, 89 So. 510.

38. **Joint Ventures**—Division of Profits.—An agreement between plaintiff, who was a real estate agent, and the defendant, who had purchased and paid for land by which each was to share one-half of the profits, construed in the light of existing circumstances and subsequent conduct of the parties as giving plaintiff no equitable title or interest in the land and not to contemplate that plaintiff pay defendant anything for an interest or that, if it be sold at a loss plaintiff would share therein.—*Clark v. Muir, Ill.*, 132 N. E. 193.

39. **Landlord and Tenant**—Description of Property.—Where, in an action of forcible entry and detainer, property was described in the complaint by the house number, street, county, and state, such description, being ample to identify and locate the property, was sufficient, though the house had been destroyed by fire and only the lot remained.—*Szulerecki v. Oppenheimer, Ill.*, 132 N. E. 202.

40. **Renewal of Lease**—In a clause in a lease giving the tenant the option to renew on the same terms offered to another, a reservation to the landlord of the right to reject all offers did not authorize the leasing of the premises to another on the terms which the former tenant was willing to accept.—*Fabacher v. Egan, La.*, 89 So. 425.

41. **Lis Pendens**—Cancellation.—In view of Code Civ. Proc. § 435, providing for the service of summons on a resident defendant who is avoiding service, a notice to such a defendant of the pendency of an action affecting title to real estate can only be canceled, under Code Civ. Proc. § 1674, if the party filing the notice unreasonably neglects to proceed in the action, even though personal service of the summons was not made on him within 60 days after the filing of such notice, or publication commenced or service thereof made pursuant to an order obtained therefor, as provided by § 1670; personal service being impossible and an order for service by publication not obtainable.—*Shostack v. Haskell, N. Y.*, 190 N. Y. S. 174.

42. **Mandamus**—Public Funds.—Mandamus is the proper remedy to compel a county treasurer, whose office has been abolished, to turn over to the banks appointed to perform his duties the money which he admits that he received as such officer, but which he claimed right to hold and disburse, under claim that the office has not been abolished.—*Tyrrell County v. Holloway, N. C.*, 108 S. E. 337.

43. **Master and Servant**—Arising Out of Employment.—Injury to a top cager at a coal mine while following his habit of riding on the cage with a loaded car to the top of the tippie for the purpose of dumping the car, which he could have reached in safety by using a stairway, held to arise out of and in the course of his employment within the Workmen's Compensation Act, though in riding he violated the Mining Act, § 12, subd. (b), such violation being at most contributory negligence, and not a departure from the scope of his employment.—*Union Colliery Co. v. Industrial Commission, Ill.*, 132 N. E. 200.

44. **Truck Driver**—A truck driver, who, while hauling goods for an express company, to which the truck was rented by the owner, lost control and ran over and killed a street laborer, was the servant of the truck owner, not of the express company, where he was hired and his services paid for by the owner, who directed him each day to proceed to the point designated by the express company, which merely told him where to get the goods, the truck being returned to the owner's garage at the end of each engagement, and the express company, having no authority to select or discharge the chauffeur, was not liable for his negligence.—*Charles v. Barrett, N. Y.*, 190 N. Y. S. 137.

45. **Municipal Corporations**—Irrevocable Grant of Franchise Unconstitutional.—Under Const. art. 6, § 12, providing that no law making any irrevocable grant of privilege, franchise, or immunity shall be passed, and Const. art. 17, § 4, providing that the exercise of the police power shall never be abridged so as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state, the granting by a city of an irrevocable franchise for a term of years to a gas company to supply gas is invalid, and since the city is not bound by the franchise, neither is the gas company.—*City of Lead v. Western Gas & Fuel Co., S. D.*, 184 N. W. 244.

46. **Principal and Agent**—Authority of Agent.—Where a person conducts a garage and is engaged in selling automobiles manufactured by a certain manufacturing company, the question whether the relation of principal and agent exists between the manufacturer and the person operating the garage will be determined by the terms of the written contract entered into by them in the absence of any act or admission by the manufacturer that the person operating the garage was authorized to bind the manufacturer by contract in the sale of automobiles manufactured by the company.—*Paige-Detroit Motor Car Co. v. Pintado, Fla.*, 89 So. 549.

47. **Railroads**—Nonsuit.—Nonsuit held properly directed, plaintiff's evidence showing that his team of mules, left unhitched and unattached, turned without apparent cause and went onto the railroad track about 50 feet away, where they were struck by a train, and that the train could not have been stopped within the time between their turning and being hit.—*Sasser v. Atlantic Coast Line R. R., N. C.*, 108 S. E. 337.

48. **Religious Societies**—Right to Convey Property.—Where covenant of religious society provided that the property brought into the society by its members should become the property of the whole society as such, with a several right of use conferred on each member, as a member, so long as he remained a member, the society having dwindled to 11 members, and having lost much of its property, and permitted remaining property to deteriorate, had the right to convey its property in consideration of grantee's agreement to support the remaining members during the rest of their lifetime.—*Board of Parent Ministry v. Bohon, Ky.*, 233 S. W. 721.

47. **Sales**—Action for Price of Goods.—Personal Property Law, § 144, subd. 3, providing for an action for goods sold, but not delivered, if the goods cannot readily be resold for a reasonable price and "the provisions of § 145 are not applicable," refers to subd. 4 of § 145, and not to subd. 3, providing for damages for the non-acceptance of goods sold where there is an available market for the goods, and hence the existence of an available market does not defeat an action for the price.—*A. Wimpheimer & Bro. v. Schwartz*, N. Y., 190 N. Y. S. 164.

48. **Condition Subsequent**—Where, after delivery to the purchaser in the circumstances disclosed in the evidence, work of a substantial character remained to be done by the seller to put the property in a condition in which it would be of some use to the purchaser, it is a fair inference that the parties did not intend that title should pass until this work was done.—*Lumbry v. Kryzmarzick*, N. D., 184 N. W. 254.

49. **Delivery**—Buyer, having failed to pay for goods delivered when payment therefor was due, was not entitled to delivery of the balance of the goods covered by the contract.—*The Famous Store v. Lund-Mauldin Co.*, Ark., 233 S. W. 767.

50. **Merchandise Quality**—"Under New York Sales of Goods Act, § 96, subd. 2, implying a warranty that goods are of a merchantable quality 'merchantable quality' means a good enough enough delivery to pass generally under that description after full examination.—*M'Neill & Higgins Co. v. Czarnikow-Rienda Co.*, U. S. D. C., 274 Fed. 397.

51. **Statutes**—Repeal.—To effect a repeal by implication the later statute must be so broad in its scope and so clear and explicit in its terms as to show that it was intended to cover the whole subject-matter and displace the prior statute, or the two must be so plainly repugnant and inconsistent that they cannot stand together, as the court will, if possible, give effect to both statutes, and will not presume that the Legislature intended a repeal.—In *Opinion of the Justices*, Me., 114 Atl. 865.

52. **Titles**—Loc. Acts 1919, p. 211, entitled "An act to authorize the commissioners' court of Conecuh county" to pay certain sum out of the county's general fund to tax assessor for extra assistance in his office, but providing in the body of the act that the commissioners' court "is required to pay" such sum to the assessor for such purpose, held violative of Const. § 45, requiring the subject of an act to be clearly expressed in its title since according to the title the payment of the money is discretionary, while according to the body of the act it is a matter of compulsion.—*Watters-Tonge Lumber Co. v. Knox*, Ala., 89 So. 497.

53. **Street Railroads**—Last Clear Chance.—The doctrine of last clear chance implies that plaintiff was negligent, that through such negligence he was in a place of peril, and that the motorman discovered such peril in time so that by the exercise of ordinary care he could have avoided the accident; and therefore though defendant's motorman saw an automobile approaching the crossing, but had no way of knowing that the driver intended to drive onto the track in front of the car until he drove upon the track, when it was too late to stop the car in time to avoid the accident, defendant was not liable; the motorman not having had actual knowledge of the driver's peril.—*Miller v. Sioux Falls Traction System*, S. D., 184 N. W. 233.

54. **Negligence**—While one approaching street car tracks in an automobile driven by another is bound to exercise reasonable care for his safety, he may trust somewhat to the expectation that the driver of the automobile will act with due regard for his own safety, and may assume that a street car will not approach an intersecting street at a rate of speed three or four times that of the automobile without warning of its approach.—*Salisbury v. Boston Elevated Ry. Co.*, Mass., 132 N. E. 239.

55. **Taxation**—Illegal Assessment.—An action at law may be maintained by a taxpayer against the tax collector for the recovery back of a tax illegally assessed and collected upon

real property.—*Seaboard Air Line Ry. Co. v. Allen*, Fla., 89 So. 555.

56. **Salary**—The salary of an associate professor in a university is "income derived from property," within Const. Amend. 44, authorizing a tax at different rates on income derived from different classes of property, and hence St. 1919, c. 324, imposing an additional income tax, is not invalid, as applied to such salary, because no tax is imposed on income from annuities, since "property" is a word of large import, and includes the right to make contracts for labor and personal service.—*Raymer v. Trefry*, Mass., 132 N. E. 190.

57. **Telegraphs and Telephones**—Commercial Messages.—A railroad which has legally, without the approval of the public service commission, under Acts 1915, p. 268, purchased telegraph lines upon its right of way, cannot be required by the Public Service Commission to transmit commercial messages to towns affected by the sale, under Code 1907, § 5632-5725, and Acts 1919, p. 1038.—*Alabama Public Service Commission v. Louisville & N. R. Co.*, Ala., 89 So. 524.

58. **Easement**—Where an easement for running telegraph lines along a right of way on a railroad was not used for 40 years, and during this time the telegraph company had accepted an exclusive lease of rights for its lines, and had later started condemnation proceedings to take part of the right of way for its lines, the nonuser, coupled with the acceptance of the lease and condemnation proceedings, sufficiently evidence an abandonment of the easement.—*Western Union Telegraph Co. v. Louisville & N. R. Co.*, Ala., 89 So. 513.

59. **Rates**—Where a state Railroad and Warehouse Commissioner commenced an investigation of telephone rates on its own initiative, pending which telephone companies made applications for temporary increases in rates, which were denied by the commission, the telephone companies could sue in a federal court to enjoin enforcement of the order denying the temporary increases, though the main proceeding was still pending before the commission, where it was likely to continue for a very considerable period of time.—*Northwestern Bell Telephone Co. v. Hilton*, U. S. D. C., 274 Fed. 384.

60. **Trusts**—Assignment of Income.—An order by a cestui que trust of the income of a trust estate, directing the payment of future income "as it comes in" to S., is a mere direction, revocable at the will of the cestui que trust and not an assignment of future income, contrary to personal property law, § 15, especially where the cestui que trust afterward requested and received part of the income personally.—In *re Oakley's Estate*, N. Y., 190 N. Y. S. 157.

61. **Breach of Trust**—Where the objectors to an accounting by an executor and trustee were married daughters and a son 22 years of age, who had kept the books of the estate, and all three knew of the executor's illegal investment of funds, and the litigation respecting such matter, an agreement and inventory signed by them, approving his accounts and releasing him generally would release him as to such breach of trust in the absence of fraud.—In *re Ungrich*, N. Y., 190 N. Y. S. 187.

62. **"Next of Kin"**—A deed of trust providing that benefits for life shall go to grantor's son, and on his death without children to his next of kin, does not entitle his widow to share in the trust fund, for the use of the words "next of kin," in connection with the phrase "in the manner and proportions directed by the laws of the state of New York for the distribution of the estates of persons dying intestate," have a controlling meaning, which excludes the widow.—*United States Trust Co. v. Hoyt*, N. Y., 190 N. Y. S. 166.

63. **Waters and Water Courses**—Rates.—Water rates fixed by a franchise to furnish water to a village and its inhabitants are controlling, and establish the rates to be charged, in the absence of any other agreement to the contrary, although contracts subsequent to the date of the franchise were made for limited periods during the life of the franchise for the same rates as those contained in the franchise.—*Waterloo Water Co. v. Village of Waterloo*, N. Y., 189 N. Y. S. 906.

Central Law Journal.

St. Louis, Mo., December 16, 1921.

RENT LEGISLATION THAT FAILED.

A statute of the state of Texas provided that a tenant may recover twice the rental advanced, if the rental exceed one-third the value of the grain and one-fourth of the cotton crop. In *Miller v. Branch*, Tex. Civ. App., 233 S. W. 1032, the facts appeared as follows:

Appellant rented to appellee a certain tract of agricultural land for the period of time between January 1, 1919, and December 31, 1919, and for it the appellee paid in advance as rental \$1,000 in cash. He cultivated the farm in grain and cotton during the year 1919 under the contract, and \$1,000 was more than the total value of one-third of the grain and one-fourth of the cotton produced on the land. Under these facts it was alleged by appellee that the rental contract was null and void and in contravention of the provisions of article 5475, and that in these circumstances he was entitled to recover from appellant \$2,000, double the amount of rent paid, as a penalty under the provisions of said article of the statutes. The appellee recovered judgment for the amount claimed, and appellant appealed upon various grounds assigned, among which the statute is assailed as being in contravention of the due process clause of the Constitution of Texas (article 1, § 19) and of § 1, article 14, of the Constitution of the United States.

In passing on the validity of the statute, the Court said:

"That the enactment is repugnant to both the state and federal Constitutions in the respects complained of by appellant is the opinion of this Court, for which reason we sustained the views presented to us in behalf of appellant. At the present term of court in passing upon another case involving the same contentions, we have construed the provision of the statute here

assailed, and in that case already have held it to be in conflict with the above-mentioned respective constitutional provisions. The case is styled *Rumbo v. Winterrowd*, and is reported in 228 S. W. page 258. There our views and the reasons sustaining them are fully expressed. They apply precisely to the case here presented. No reason for modifying or extending any part of that opinion occurs to us in connection with the instant case, and we therefore merely refer to the *Rumbo* case, above cited, for a full expression of the conclusions of law upon which we dispose of this appeal."

Cases upholding the New York rent statute were hauled out in support of the validity of the Texas law, but the Court disposed of them in the following language: "Appellee cites, as in conflict with the decision of this Court in the *Rumbo* case, the case of *People v. La Fetra*, 230 N. Y. 429, 130 N. E. 601, recently decided by the Court of Appeals of New York, and the case of *Block v. Hirsh*, 255 U. S.—, 41 Sup. Ct. 458, 65 L. Ed.—, also recently decided by the Supreme Court of the United States. The constitutionality of legislation to regulate housing conditions in New York City was upheld in the former case, and a law designed for the same purpose in Washington was held to be constitutional in the latter. In both instances there were vigorous dissenting opinions. We deem it unnecessary to discuss at length the holding of the majority in either case.

"The grounds, however, upon which the validity of the enactments in those cases was declared are not present in the legislative act which our decision in the *Rumbo* case nullifies. We perceive no analogy whatever between either of those decisions and that in the case of *Rumbo v. Winterrowd*. The legislative acts under consideration in both of those cases were designed to meet an emergency arising out of the disordered conditions and turmoil resulting from the World War to which the inhabitants of those cities had fallen victim. Both measures were born of a

purpose, expressed in the legislative acts and recognized by the courts' decisions, to protect the public in a passing emergency in the nature of a public calamity for which the police power may always be invoked. The legislative acts passed upon in those cases were demanded to protect the health, the morals, and the general welfare of the public, which were ascertained to be threatened because of temporary abnormal conditions produced by world-wide warfare among all civilized peoples. The good of the whole public, in the situation dealt with, demanded suppression of the profiteer's greed as much as the public welfare demands suppression of the gamblers' depredations at all times. An examination of this Court's opinion in the *Rumbo* case reveals no statement questioning the right and authority of the legislature to bring into action the police power in such exigencies as those of which the legislative acts construed by the New York Court of Appeals and the Supreme Court took cognizance. But the situation and the conditions, to which the Texas statute construed by us in this case and the *Rumbo* case applies, are wholly dissimilar to those passed upon in the cases cited. The act involved here arbitrarily imposed restrictions upon the classes to be affected in normal times, and as a permanent thing, destroying the right to contract with reference to a subject-matter unaffected by any public interest."

In the case of *Block v. Hirsh*, 255 U. S.—, 41 Sup. Ct. 458, the Court stated that the regulation there under consideration was put and justified only as a temporary measure. Further, in the same opinion the Court says: "Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing conditions of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it as much a bus-

iness as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

In other words the legislation was upheld on account of the abnormal condition brought about by the war.

B.

NOTES OF IMPORTANT DECISIONS.

RIGHT OF PRESIDENT OF CORPORATION TO ADMIT BANKRUPTCY.—It is quite an important question in the law of corporations whether the president of the corporation can commit the corporation either for or against insolvency by the filing of an answer to an involuntary petition in bankruptcy. The Circuit Court of Appeals (Second Cir.) held (one Judge dissenting) that he could do so where the directors were evenly divided over the question of confessing or denying bankruptcy. *Regal Cleaners & Dyers v. Merlis*, 274 Fed. 915.

In this case the petitioners filed a petition in the District Court to have the *Regal Cleaners & Dyers, Inc.*, a New York corporation, adjudged an involuntary bankrupt. The grounds alleged were insolvency and a preference and transfer made in fraud of creditors. An answer was filed, denying the allegations of the petition. It alleged that the petition was filed as a result of a conspiracy to accomplish the ruin of the alleged bankrupt corporation. It was verified by its president. A petition was then filed to strike out the answer from the files of the court below and the appearance made by the attorneys for the corporation, on the ground that the appearance of the attorneys and the verification and filing of the answer were unauthorized acts. It is conceded that the board of directors did not authorize the filing of the answer. There are four directors of the corporation, two of whom appeared to want the corporation

to be adjudicated a bankrupt, and two of whom opposed. The question presented was, under these circumstances, is it the duty of a president, and may he, without authorization from the board of directors, file an answer placing in issue the allegations of a petition setting forth acts of bankruptcy consisting of fraud and deceit to hinder and delay its creditors while insolvent?

In holding that the president had not exceeded his authority the Court said:

"If there exists a defense to this petition, while ordinarily it is beyond the authority conferred upon a president of a corporation to interpose an answer, still circumstances may exist which, in equity, would require him making an answer, although he has not the authority of a resolution of the board of directors of his corporation. If the company is solvent, for the president not to prevent such a result might cause irremediable injury, or perhaps total failure of justice to the stockholders. Under these circumstances, we think the president should, in the due performance of the duties of his office, verify and file an answer as such officer. Ordinarily he must make an earnest effort with the managing body of the corporation, the directors, to induce remedial action on their part, and this must be made apparent to the court. If he fails with the directors, he may then proceed. If he does not make request of the directors, he may show that a request would be futile. Such appears from the facts here. There is no showing that the directors have been requested and have refused, but it does expressly appear that two of the four directors are in favor of the adjudication in bankruptcy. Thus the vote is a tie. Under these circumstances, to apply to the directors for instructions would be futile. We think that the answer should be permitted to stand, and the issues as to the questions involved tried."

Justice Ward in dissenting, said:

"It is quite inconceivable to me that the president by virtue of his office can commit the company either way, more especially in a case like the present, where he is one of four directors who are equally divided in opinion and who own the whole capital stock of the company in equal shares. The attitude of the company is to be determined by the board of directors and when the board of directors is equally divided the company can neither resist nor consent to an adjudication. Therefore I think the motion to strike the answer and the appearance of attorneys in support of it from the files of the court as unauthorized by the company should have been granted. This would have left the court under § 18e of the Bankruptcy Act either to make an adjudication as upon default or to dismiss the petition, if any fatal legal defects appeared on the face of it. The court below did not know, and we do not know, which of these contesting parties was right. The question was purely one of law, and it seems to me that a practice is approved which may hereafter lead to dangerous consequences."

It seems to us that the majority of the Court reached the correct conclusion. If there was, in fact, a defense to be made to this proceeding some one should have set it up. Even a majority of the Board could not refuse to set up such a defense and if it did so any stockholder could intervene (at least in an equity suit) and set up a defense which the corporation should have made.

THE OBLIGATION OF FEDERAL JUDGES TO HOLD NO OTHER SALARIED POSITION, PUBLIC OR PRIVATE.*

Under the terms of the Constitution of the United States, the Judges of the Supreme Court and the inferior courts established by the Congress hold their offices during the good behavior and receive for their services a compensation which cannot be diminished during their continuance in office. (Const., Art. III, § 1).

The jurisdiction of all courts, except that of the Supreme Court, is derived from and is subject to the absolute control of Congress and may be taken away or changed at its pleasure (See *Stuart v. Laird*, 1 Cranch. 299; *U. S. v. Haynes*, 29 Fed. Rep., 691, 696). The District Courts of the United States were created by the Judiciary Act of 1789 in thirteen districts (Act of September 24, 1789, § 4) and as the country developed other districts have from time to time been created, so that there are now 78 judicial districts divided among nine judicial circuits.

The original jurisdiction conferred by the Judicial Code on the District Courts is embraced under twenty-five different heads (J. C., § 24), and covers practically all civil causes at law or in equity, admiralty, patent, trade mark and copyright law, bankruptcy, monopolies and revenue and postal

*This contribution took the form of a letter addressed to our contemporary, the *New York Law Journal*, by Mr. Justice Benedict of New York, and a copy sent to a New York member of Congress. It discusses an issue which has agitated the profession during the last year.

laws and other matters of civil jurisdiction, as well as of all crimes and offenses cognizable under the authority of the United States.

It is apparent that with the rapid growth in population there is at all times a corresponding growth in the number of cases cognizable by the District Courts. That this fact is being recognized in Congress, I refer to the table published in the *Congressional Record* recently, from statistics furnished by the office of the attorney-general and referred to in the remarks of Senator Spencer of Missouri on the "Dockets of the Federal Courts."

From this table and the debate in the Senate it is found that the number of cases commenced in 1920 was 91,254 as against 50,691 in 1912; the number of cases pending at the end of 1920 was 118,744 as against 102,299 at the end of 1912, and it was estimated that at the end of 1921 this number would increase to 140,000 cases, of which about one-half would be criminal and one half civil in character.

There is now pending in Congress a bill to increase the number of district judges by eighteen, and, in support of this measure, the Chief Justice of the United States has recently appeared before a committee of the Senate to urge the enactment of the measure.

It can hardly be doubted, in view of the condition of the dockets of the federal district courts of the country, that every one of the judges now charged with the duty of administering justice in these courts is urgently needed, in the language of the oath which he takes, faithfully and impartially to discharge and perform all duties incumbent upon him according to the best of his abilities and understanding, agreeably to the constitution and laws of the United States.

The district judges are clothed, under the Judicial Code, with very great power and authority, over the lives and property of the persons and corporations within the jurisdiction of the courts of the United

States. In addition to the duties imposed on them as district judges they are competent to sit in the Circuit Court of Appeals within their own circuits.

They are furthermore authorized to sit anywhere in the United States when, on account of absence or inability of a district judge or of the accumulation or urgency of business, the public interests require that they shall be designated or appointed to sit in a circuit other than their own, and while so sitting to have the same powers as the judge of the district requiring such relief.

It is evident that the office of district judge is, under our laws, an office which demands and usually commands the very highest quality of judicial service. The district judge is selected by the President, by and with the advice and consent of the Senate, and holds his office practically for life, because although under the Constitution he holds it "during good behavior," he cannot be compelled to resign it, but has the option to resign after he shall have held his commission for ten years and has attained the age of seventy years, whereupon, during the residue of his life, he continues to receive the same salary as before his retirement.

The Constitution and laws have thrown around the office great safeguards for the maintenance of the independence of the court by giving the judge a tenure practically for life, with a fixed compensation which cannot be diminished, and by removing from him any necessity for engaging in politics in order to remain upon the Bench. No system ever devised by the wisdom of mankind was better calculated to create and maintain all those attributes of justice on which the whole framework of our judiciary rests.

More than 130 years ago Alexander Hamilton, in discussing the plan of the convention that all judges who may be appointed by the United States are to hold their offices during good behavior, wrote in the *Federalist* (No. 58): "The stand-

ard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable improvements in the practice of government." * * * "And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of our laws."

The district courts are an integral part of the judicial power of the United States. That judicial power rests upon the foundation of the original purpose of the people of the United States to create and forever to maintain a cohesive force, binding the states in the Union and supported alone by the faith and respect of the people. Beyond and outside of this faith and respect the courts are the weakest branch of our government and are dependent for the enforcement of their judgments and for their own protection on the two other co-ordinate branches by which our system of republican government in our modern democracy is checked and balanced. These considerations may embody truisms, but they can never become platitudes so long as our system lasts.

Our courts are instrumentalities of government established by the people for the common good, not for the good of the judges who minister in them. Anything, therefore, which belittles or degrades our courts or judges, whether federal or state, and whether the court or judge be superior or inferior in function, threatens the destruction of the foundation on which the system rests, viz, the faith in and respect of the people for their courts.

In framing the Judicial Code of the United States, the Congress preserved the rule by which judges of the federal courts should not engage in the practice of the law or exercise the profession of counsel or attorney. Such provision was plainly intended to remove from the judges the temptation to neglect judicial duties for professional service as lawyers. It was plainly intended that, while

serving as a judge, the incumbent should be removed from strife at the Bar; that he should not be an advocate after he had become an arbitrator; that his entire time, talents and thought should be devoted to the duties of his office; that thenceforth his life should be consecrated to the highest service that a man can render to his fellowman—that of awarding impartial judgment between them, being swayed by no consideration other than that of determining the very right of the matter.

Unfortunately, judges are only human instruments, differing in learning, in legal capacity, in breadth of vision and industry, and, unfortunately, in ethical perception as well. Hence it is wise and proper that there should be thrown around them, as individual members of the system, proper restrictions and limitations intended to preserve their independence of thought and action. I think that it never entered the minds of those who framed the Constitution and laws that a judge, while receiving the compensation of his office, should so far forget his sworn duty to the public as to engage in the service of another master for another and far greater compensation.

The people in this country have recently had revealed to them a spectacle of a federal judge who so far overlooked and disregarded, if he did not intentionally violate, every consideration of judicial propriety and ethical conduct as to accept a high position in connection with professional sport at a salary greatly in excess of the compensation he is receiving as a federal judge. Whatever may have been the motive which prompted the offer, and however dazzling the immediate reward may have seemed to its recipient, its acceptance involved a sacrifice of dignity and public esteem the humiliation of which the entire Bench of our land was forced to undergo. This untoward act has been the subject of well-merited re-

buke at the hands of a bar association representing the entire country. It deserves and should receive the most vigorous and outspoken condemnation from every judge, high and low, throughout the country. It deserves and should receive the indignant protest of every American who respects our republic and reverences its judiciary. No argument ought to be necessary to convince right-minded men and women of the dangers to our judicial system from such a course of conduct as this, and none will therefore be set forth here. But in the interest of justice and to remove the stain from the ermine of our entire judicial magistracy our national legislature ought to make such a thing forever impossible. To that end I am addressing this letter to you (as my district's Representative in Congress) to suggest the necessity and propriety of changing the present law to cover such a case. This can be done by amending § 258 of the Judicial Code by the insertion at the end of the first sentence of the following words: "Nor shall it be lawful for him, while holding such office, to hold any other office or position, public or private, from which he shall receive a salary or stated compensation," so that the entire section would read as follows:

"Section 258. It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney or to be engaged in the practice of the law, *nor shall it be lawful for him, while holding such office, to hold any other office position, public or private, from which he shall receive a salary or stated compensation.*... Any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor."

RUSSELL BENEDICT.

Brooklyn, N. Y.

SHARES TRANSFERRED IN SECURITY TO BANKS—PRACTICE AS TO RE-TRANSFER.

The Court of Session, the Supreme Civil Court in Scotland, has just had occasion to decide an important and novel question intimately affecting banking practice. *Crear v. Bank of Scotland*,¹ was an application for an order on the Bank to produce before the Court, "a full and particular account of their intromissions with 2775 or thereby ordinary shares of Messrs. J. & P. Coats, Ltd., transferred by the plaintiff to the defendants in security of advances made by them to the plaintiff: and to grant decree against the defendants for payment to the plaintiff of such sum as may be found to be the true balance due to the plaintiff by the defendants in respect of their said intromissions . . . ; or in the event of the defendants failing to produce an account as aforesaid, to grant a decree against them for payment to the plaintiff of the sum of £25,000 sterling, which sum should in that event be held to be the balance due by the defendants to the plaintiff in respect of their said intromissions"

The defense of the Bank was that they could not account for the specific shares transferred to them, identifying each by its number, but that they could transfer the same number of ordinary shares of Messrs. J. & P. Coats, Ltd., to the plaintiff. Was this sufficient? To answer that question the Court found it necessary to examine the practice and course of dealing of the defendant bank.

Among the services which the bank offers to perform for its customers is that of providing financial accommodation of their system of "secured loan accounts." All securities held against these accounts are vested on *ex facie* absolute titles, in nominees of the Bank. These nominees are selected from among the bank's employees and act under the bank's instruc-

(1) 1921, 2 S. L. T. 112.

tions. They perform no function by themselves, as distinct from the bank, except as depositories of title. But in that capacity they come to be registered proprietors of large holdings of the better known Stock Exchange securities. The bank keeps a securities register in which each customer who opens a secured loan account is credited with whatever *quantity* of shares of stock of any denomination, belonging to him, is held from time to time against his secured loan account. This record takes no account of anything but quantity and denomination. As among stocks or shares of the same denomination held by the nominees, no attempt is made to identify (or to preserve evidence for the identification of) any particular or specified holdings (e. g. by the numbering of the shares or of the certificates) as being those transferred by, or held on behalf of, any particular customer. This mode of dealing with securities given to the bank is not restricted to secured loan accounts, but no question arises with regard to it in this case except in relation to accounts of that particular class.

Suppose a customer wants to open one of these accounts; he may himself transfer to the bank's nominees shares already registered in his own name, or he may arrange through his broker that the persons from whom he has purchased shares shall transfer these to the bank's nominees. In both cases the shares transferred are specific shares, identified and distinguished by number; but, while the customer is credited in the securities register with a corresponding quantity of shares of the same denomination, his specific (numbered) shares become mixed with and merged in the mass of similar shares held by the bank through its nominees. Especially in the case of shares transferred by the persons from whom the customer has purchased them, all trace of identity may be thus destroyed, for the transactions recorded in the securities register are too many and complicated to allow of tracing the identity

of every particular transfer with a corresponding credit entry in the register. When the customer repays his loan, in whole or in part, and claims return or release of all or some of his shares, the requisite quantity of shares standing to his credit in the securities register is taken out of the mass and transferred to him; but the particular shares thus transferred are not (unless by accident) the particular shares (bearing the identical numbers) which he originally gave to the bank in security. The chances are that those particular shares have already been carried away by other customers who also had secured loan accounts against shares of the same denomination, and whose demands for release or return of their shares have been met by means of those particular shares.

The system offers special convenience in connection with Stock Exchange business, and the way in which it is used by brokers inter se, and by brokers in relation to their clients results in the almost complete obliteration of traceable distinction between particular customers' holdings as these are merged in the general mass. Stockbrokers usually have a secured loan account in their own names, for the accommodation of their clients, whose stocks and shares are employed as security therefor. This practice was under consideration in *National Bank of Scotland v. Dickie's Tr's*.² The state of transactions, as between one broker and another, and the inability or unwillingness of their clients to furnish the cash necessary to carry those transactions to their full conclusion, often makes it convenient that a *quantity* of shares standing to the credit of broker A should be transferred to the credit of broker B in the securities register. This is done by means of a "delivery letter" addressed to the bank. In such a case the mass of shares held by the bank's nominees remains unchanged, while broker B gets the same financial facilities with re-

spect to the quantity of shares mentioned, in the "delivery letter" as broker A did, but it is quite impossible to say which particular shares in the mass have come to be held on account of broker B which were formerly held on account of broker A. In like manner—suppose that a broker's purchasing client wants to hold a purchase of shares for a more or less considerable time, but is not in a position to furnish the cash to pay for them, then, if the state of the broker's transactions, as these have passed through the Stock Exchange Clearing House, is such as to enable him to supply the shares purchased out of other (selling) client's shares already on his hands (and employed as security for the secured loan account in his own name), all he has to do is to address a "delivery letter" to the bank instructing that a quantity of shares out of those standing to his credit in the bank's securities register, sufficient to implement the purchase, are to be held on account of the purchasing client. The latter is thus put in a position to open a secured loan account of his own. Again, however, it is impossible to say which particular shares in the mass have come to be held on account of the purchasing client.

The working of the system is rapid and simple; it avoids the delay and expense of repeated transfers and registrations; and it is much less open to risk of mistake and confusion than would be the case if each transaction were carried out with reference to numbered and registered shares. The striking feature of the system is that once the shares are transferred to the bank's nominees they are treated as being identical with and undistinguishable from any other shares of the same denomination which have been similarly transferred. By its own nature the system is inconsistent with the retention, or even the existence of any right of *specific* property, on the part of customers who avail themselves of it, in the shares which form the security for their loan accounts. This brings the relation between the bank and such cus-

tomers into marked contrast with that of ordinary borrower and lender in a secured loan. *An ordinary lender has no right to do anything with the subject of the security held by him except what is necessary to effectuate the security, and subject to that qualification must hold and return it exactly as he got it.* It will be observed, however, that, in the very numerous cases in which the customer's right to the shares which form the security for his account is acquired by "delivery letter," the system is not necessarily inconsistent with the principles applying to an ordinary secured loan. All the customer has, and all the bank gets in security, in these cases is a right to a certain *quantity* of shares in the mass; and in that state of matters when release and return is demanded by the customer he has, even under the law applicable to an ordinary secured loan, no right to insist on being supplied with any particular numbered shares; for he gave no particular numbered shares to the bank. He must therefore, be content to accept any of those tendered to him out of the mass. Where, on the other hand, the customer has transferred, or has arranged with his broker that the persons selling to him should transfer, specific (numbered) shares, the system necessarily implies (and rests on) the condition that the customer surrenders his right to such specific or numbered shares in exchange for a right to a corresponding *quantity* of shares of the same denomination out of the general fluctuating mass in the hands of the bank's nominees.

The plaintiff in this case availed herself of the facilities afforded by the system described for many years in connection with Stock Exchange transactions of a more or less speculative character in the shares of J. & P. Coats. The shares which came to form security for her secured loan account did so in all the different ways above explained—largely by "delivery letter." But she now alleged that she was ignorant of the nature of the system, that neither the bank nor her brokers ever explained it to

her, and that she thought her relations with the bank were those of an ordinary borrower and lender in a secured loan. She therefore claimed that the bank must account to her for its intromissions with every specific share transferred to its nominees by her, or by persons from whom she purchased them, on her behalf. She also claimed an accounting in respect of the *quantities* of shares dealt with by "delivery letter," on the footing that it was the duty of the bank to set apart and earmark specific (numbered) shares against these letters. So far as the law of security goes, this appeared to be a hopeless claim. The bank had all along held and now tenders to her the like *quantity* of shares as they got on her account.

As regards, however, the shares transferred by plaintiff in security, the true question was whether the knowledge brought home to the plaintiff of the course of dealing, which the system implies and follows, is or is not enough to establish that she agreed to participate in and to be bound by it. "It is not necessary," said the Lord President, "that she should have fully comprehended the effects of that course of dealing; for it is a principle of evidence in relation to commercial contracts that they 'cannot be arranged by what people think in their inmost minds,' but according to what they say and do in their transactions together."³ If it is proved that the plaintiff's employment of the bank and her transaction on secured loan account were in themselves inconsistent with the existence on the part of the bank of the duty which she says she thought they owed to her, viz., to hold specific shares against her account, she may be held to have agreed to all the terms and conditions of the system, even though she did not grasp their legal effect."

The Court were of opinion that knowledge and assent to a course of dealing was proved against the plaintiff and they dismissed her application.

It should be noted, however, that the ground of decision was that plaintiff's course of dealing barred her claim, otherwise the Bank would have been bound to retain specific shares. This was brought out by the Lord President in the following passage—"It is probably impossible to reduce the relations between a bank and a customer who avails himself of the complicated machinery of credit which a bank places at his disposal under any one chapter of legal rights and obligations. A bank is often said to be employed by its customers as their financial agent, and the characteristics of stability and integrity which are the indispensable conditions of their existence import, at some points in the field of agency covered by their functions, rights and powers which would be inadmissible at law in any ordinary agency. But I doubt whether, apart from proved custom of trade, or agreement, the fact that a customer employs his bank to provide him with financial accommodation on security could be held to cover an authority to convert the customer's right to specific (numbered) shares, transferred as security for his account, into a right to a corresponding *quantity* of shares out of a mass of shares of the same denomination, held for account of all its customers who employ it in the like manner. The evidence in the case does not amount to proof of custom of trade."

An argument was presented for the bank to the effect that the partnership interest vouched by a share is, in fact and in law, identical with and indistinguishable from the partnership interest vouched by any other share of the same denomination. But, notwithstanding the substantial identity of such shares, each individual numbered share represents a separate *jus crediti* and, if only for the purpose of tracing title, the person to whom a specific share belongs has a right and interest in it as such distinct from the partnership interest which it vouches. However convenient and useful both to the bank and to its customers the system of secured loan account may be.

(3) See per Lord Dunedin in *Muirhead v. Turnbull & Dickson*, 1906, 7F at p. 694.

it is not in the least necessary to effectuate the security which the bank holds for its indemnification, that the means of tracing the customer's title should be obliterated.

DONALD MACKAY.

Glasgow, Scotland.

**HUSBAND AND WIFE—RIGHT OF WIFE TO
RECOVER FOR INJURY TO HUSBAND**

HIPP v. E. I. DUPONT DE NEMOURS & CO.
108 S. E. 318.

Supreme Court of North Carolina, Sept. 14, 1921.

In view of the status and rights of married women under Const. 1868, art 10, § 6, and C. S. § 2513, a wife may sue for damages to her from negligent injury of her husband, but can recover nothing which he could recover or which in case of his death from the injury his personal representative could recover.

The plaintiff, who is the wife of W. B. Hipp, brings this action alleging that her husband, while working as an employee of the defendant company in Hopewell, Va., was, "seriously, painfully, and permanently injured as a proximate result of the carelessness and negligence of the defendants," setting out the manner in which he was injured and the extent of such injuries and the expense, and that, under the law of Virginia, which is set out, the plaintiff was entitled, as a married woman, to sue and be sued as if she were unmarried, and to own and control her property as fully as if she had remained single, and that neither she nor her husband have received anything whatever from the defendants in the way of damages, for the serious injuries inflicted on him; and that her husband brought action in Virginia, but, notwithstanding three separate jury verdicts afforded him, the Court of Appeals of that State rendered judgment against him upon demurrer to the evidence; that the plaintiff is entitled notwithstanding to recover in this jurisdiction, she having obtained service upon the defendants, for the personal injuries inflicted on her by the injury to her husband. The defendants demur upon the ground that it appears upon the face of the complaint that judgment has been rendered in Virginia, that her husband was not entitled to recover, and that it appears inferentially therefore that under the law of the state of Virginia she has no action for the loss of her husband's company, for damages to her consequent upon injury sustained by him, caused by the negligence of a

third person, where the husband's right of action, if any, is barred. The judge overruled the demurrer, and the defendants appealed.

CLARK, C. J. The demurrer admits all facts sufficiently pleaded, and therefore we must take it that the plaintiff's husband was "seriously, painfully, and permanently injured as the proximate result of the carelessness and negligence of the defendants," and that by reason thereof the plaintiff has suffered shock, which has impaired her nervous system, impaired and permanently injured and weakened her physical and mental condition, and that she has suffered greatly from loss of sleep, worry, and anxiety on account of the condition of her husband; in watching over and caring for him, causing her to devote her entire time to nursing and caring for him, while at the same time the burden of maintaining the family fell upon her, entailing heavy cost and expense, and that she has been forced to pay out large sums of money to hospitals, doctors, nurses, and medical expenses, and that by reason of said injuries she has been deprived of the support and maintenance which her husband would have given her, and has suffered mental anguish by being forced to witness the suffering endured by her husband, whereby her own nerves and health have been seriously and permanently shocked, weakened, and impaired; and that by reason of the physical and mental condition of her husband she still continues to suffer in mind and body, and has been denied the care, protection, consideration, companionship, aid, and society of her said husband, and the pleasure and assistance of her husband in escorting her to visit friends and relatives, and has been required to remain at home for long periods of time, denying herself to friends and relatives, and besides has had entailed upon her the fatigue of nursing and caring for him, and incurred expenses, and has paid large sums on that account. These matters are set out more at length in the complaint, but this is a summary of the grounds of her action—all of which allegations of facts are admitted as pleaded by the demurrer in effect presents two questions of law upon these facts:

(1) The first is that the judgment against her husband in Virginia (*Dupont v. Hipp*, 123 Va. 49, 96 S. E. 280) bars any right of action which she might have for damages for grief, mental anguish, labor, and expense devolving upon her by the disability of her husband and the loss and comfort of his society.

(2) The second is that upon the facts admitted the wife is not entitled to maintain this action.

As to the first ground of demurrer, if the wife has a cause of action we do not think the demurrer can be sustained. She was not a party to the action brought by her husband, and she is not estopped by the judgment as to any relief she might be entitled to. It may be that upon the trial of this action an entirely different state of facts as to the manner in which the husband was injured might be developed, either by additional evidence or by the estimate placed upon the evidence by the jury. She was neither a party nor a privy to that action.

In *Laskowski v. People's Ice Co.*, 203 Mich. 186, 168 N. W. 940, 2 A. L. R. 586, it was held that—

"A judgment in favor of a wife in an action to recover damages for injuries to her person is not conclusive upon the question of defendant's negligence, and absence of her contributory negligence, in an action by her husband for the damages resulting to him from such injuries."

Of course the reverse must be true, since, as held in that case, under the Married Woman's Act, he was not a necessary or proper party to the action by his wife to recover damages for injuries to her person, and was not, in fact, a party. See notes to that case (2 A. L. R. 592) citing many cases that neither the judgment in such cases nor a settlement by compromise on the part of the wife would affect the husband's right to recover for the damages sustained by him, quoting among others *R. R. v. Kinman*, 182 Ky. 597, 206 S. W. 880.

But the second ground of demurrer presents an entirely different question. At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse, his slave, or any other property; that is to say, by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that "by reason of the unity of marriage" such actions could be maintained by the husband. But singularly enough this was not correlative, and the wife could not maintain an action for injuries sustained by her husband. The reason is thus frankly stated by Blackstone:

"We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties (husband) injured by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior (the wife) by such injuries is totally unregarded. One reason for this may be this: That the inferior hath no kind of property in the company, care or assistance of the superior as the su-

perior is held to have in those of the inferior, and therefore, the inferior can suffer no loss or injury." 3 Blackstone's Commentaries, 143.

By the married women's provision in the Constitution of 1868, art. 10, § 6, this conception of ownership by the husband whereby upon marriage all the personal property of the wife became the property of the husband, and he became the owner of her realty during his lifetime, was abolished. The courts in this state continued for a long while, notwithstanding, to hold that the husband could recover his wife's earnings and the damages for injuries done her; but by Acts 1913, c. 13, now C. S. § 2513, it was provided that her earnings and damages for torts inflicted upon her were her sole and separate property for which she could sue alone.

It follows therefore that the husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. We agree with the learned counsel for the plaintiff that if the husband could maintain an action to recover damages for torts on the wife she should be able to maintain an action on account of torts sustained by the husband. Such right of action, if it existed in favor of the husband, should exist in favor of the wife. It should be in favor of both or neither, but, in view of the Constitution of 1868 and our statute on the subject, we think that such action cannot be maintained by either on account of the injury to the other.

So far as injuries to the husband are concerned and the damages he has sustained, whether the plaintiff recovers or fails to do so the verdict and judgment are conclusive. The wife certainly cannot recover a second time for the injuries of the husband, who alone can sue for them (or, in case of wrongful death, his personal representative); but the action of the wife is not for the injuries to the husband, though formerly the husband was allowed to recover damages for the injuries sustained by the wife because they were his property. *Price v. Electric Co.*, 160 N. C. 450, 76 S. E. 502. That is now swept away.

The cause of action for the wife in this case is not for the injuries to the husband, but for the injuries to herself, which are thus summed up in the brief for the plaintiff in this action:

(1) Expenses paid by her, made necessary by her husband's injuries.

(2) Services performed in nursing and caring for him.

(3) Loss of support and maintenance.

(4) Loss of consortium.

(5) Mental anguish.

Though the husband can no longer recover for the damages which his wife has sustained as property belonging to himself, he may still recover for the damages sustained by him by reason thereof which have been held to include expenses incurred, deprivation of society, and loss of aid and comfort.

In *Kimberly v. Howland*, 143 N. C. 398, 405, 55 S. E. 778, 781 (7 L. R. A. [N. S.] 545), the plaintiff's wife received a serious injury by reason of the defendant's negligence. The Court said:

"It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense, or is deprived of the society or the services of his wife, he is entitled to recover therefor, and he may sue in his own name."

In *Bailey v. Long*, 172 N. C. 661, 90 S. E. 809, L. R. A. 1917B, 708, decided since chapter 13, Laws 1913, the plaintiff had taken his wife to the defendant's hospital. By reason of the defective condition and construction of said hospital, his wife contracted pneumonia and died. The plaintiff brought the action for damages suffered by him. Mr. Justice Brown, for a unanimous court, held that the plaintiff could recover for expenses which accrued to him for nursing and otherwise, and said:

"In addition, we think plaintiff can recover damages for the mental suffering and injury to his feelings in witnessing the agony and suffering of his wife while lingering with such cold and pneumonia, and in the act and article of death resulting therefrom."

We do not think that the husband could now recover compensatory damages for her physical and mental anguish, nor for the value of her services, which are matters purely personal to her, and for which she alone could recover, though formerly these were the basis for an action by the husband. As he can no longer sue for her earnings, of course, he is not entitled to recover the value of her services. But the great weight of authority sustains the proposition that, under the modern statutes enlarging the rights of married women, the husband is not deprived of his right to recover the damages which he himself sustains, and which are the direct consequences of the injury to the wife. He cannot sue for the injuries she sustained, but for those which accrued to himself as the direct and not the

remote consequences of such wrongful act of the defendant. 13 R. C. L. § 642; 21 Cyc. 1527.

In *Holleman v. Harward*, 119 N. C. 150, 25 S. E. 972, 34 L. R. A. 803, 56 Am. St. Rep. 672, where the defendant had sold the plaintiff's wife laudanum or similar drugs despite the plaintiff's protests, the court held that the husband could recover for loss of companionship and loss of services resulting therefrom. While the statute now does not permit the husband to recover for loss of services, which must be recovered solely by the wife, the loss of the companionship of his wife is a loss purely personal to him, and the direct consequence of the wrong of the defendant. For this the wife could not recover, and being the direct and not remote consequence of the wrongful act the husband is entitled to his action.

In *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360, Ann. Cas. 1913A, 983, where the defendant had sold drugs to the husband over the wife's protests, it was held in exact analogy to the above case from this court, that she could recover for the damages thus resulting to her.

One of the chief grounds for the plaintiff's recovery is the loss of consortium which was formerly pleaded by the phrase, "per quod consortium amisit." This formerly lay only in behalf of the husband, but now the term has been extended to give the wife, and with more reason, the same ground of action. The present state of the law is thus fully stated under the heading of Consortium, 12 Corpus Juris, 532, with full citations in the notes.

There are decisions from other courts denying relief to the wife in cases of this character. Such decisions are necessarily dependent upon two factors: (1) The legislation in reference to the rights of married women in the particular jurisdiction; (2) the attitude of the court in giving either a liberal or restricted construction to new legislation of the nature of that in this state. As was well said by Chief Justice Bond in the above case:

"So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the meed of justice for married women."

The reasons formerly advanced for a denial to the wife of a recovery for damages sustained by her as a direct result of the injury to him and which are over and above and distinct from the damages which could be recovered by the husband in an action by himself were threefold: (1) The merger of her identity into that of her husband; (2) her incapacity to sue; (3) the right of her

husband to recover full damages for his diminished earning capacity, with no corresponding right possessed by her.

Neither of the first two grounds are now valid in this state. It is urged, however, that the plaintiff, after he had obtained a recovery, is presumed to have obtained full pecuniary compensation for all the injuries sustained by him, and of course, if he failed to recover, no action can be maintained by the wife. This proposition is correct if the action of the wife is for the damages for which the husband could maintain an action, but the facts as admitted by this demurrer are that he was injured by the negligence of the defendants, and that the wife sustained damages, which, though flowing from the injuries to her husband, are purely injuries to herself, and for which the husband could not have maintained an action. She is therefore not barred by the judgment, favorable or unfavorable, in the action brought by her husband. A judgment in an action is not effective as a bar or estoppel in any other action unless between the same parties and for the same cause of action. The present action is not between the same parties nor for the same cause of action as in the litigation between the husband and the defendants.

It has always been held that the husband's action for damages sustained by him on account of injuries to her is not barred by judgment in favor of the same defendant in an action brought by the wife. See cases cited in the notes to 2 A. L. R. 592. Of course the reverse of the proposition is true. 13 R. C. L. § 461.

As already stated, the rights which the wife is asserting in this action are entirely separate and distinct from the grounds of recovery asserted by the husband in his action. In paragraph 12 of the complaint is the following allegation which is admitted by the demurrer to be true:

"That, by reason of the sudden and fearful injury of her husband as above stated, and by reason of being forced to look upon him in his horribly mutilated condition, she was shocked and frightened to such an extent that her entire nervous system was impaired and undermined and left permanently injured and weakened, and her physical and mental condition was permanently injured and impaired."

In *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778, the Court said:

"We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether willful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."

This was cited and approved, *Walker, J., May v. Telegraph Co.*, 157 N. C. 422, 72 S. E. 1059.

While the wife cannot recover for any damages for which the husband might have recovered (or for personal representative in the case of a wrongful death), we think that she could recover for those injuries which were sustained by her, and, being personal to her, for which the husband could not have recovered in his action. 15 A. & E. (2d Ed.) 861, which is cited in *May v. Telegraph Co.*, 157, N. C. 423, 72 S. E. 1059.

We will not go more fully into the elements of damages which can be considered by the jury when the action goes back for a new trial.

It is objected by the defendant in this case that, if such action can be maintained by the wife, it can be sustained on the part of the children or other dependent relatives. That plea has never been found good when the action has been brought by the husband, and of course it cannot avail when the action is by the wife upon the same state of facts. The wife's cause of action arises from the nature of the relationship created by the contract of marriage as now recognized by our Constitution, and the laws replacing the former status, under which, by the common law, the husband was the sole personage. Such plea has not been held valid in an action for criminal conversation or for alienation of affections, or in any other case in which an action by either husband or wife has been brought for injury to the plaintiff (whether husband or wife), which were personal to the plaintiff therein, and for which the other party could not maintain an action. It does not depend upon the action of loss of services of the other party to the marriage, but is based upon the ground that the party bringing the action (whether husband or wife) has been directly injured by the wrongful conduct of the defendant.

It is sufficient to say that the plaintiff has a cause of action for those injuries which were sustained by her, and which are personal to herself, and the direct and not the remote consequences of the negligence of the defendants, which is admitted by the demurrer in this case; and the judgment overruling the demurrer must therefore be affirmed.

NOTE—Right of Wife to Recover for Negligent Injury of Husband.—In this connection see *Cooley on Torts* (Third Edition) 477; *Jaynes v. Jaynes*, 39 Hun (N. Y.) 40; *Flandermeyer v. Cooper*, 85 Ohio, 327; *Holleman v. Harward*, 119 N. C. 150; 13 R. C. L. 1460, § 509.

In the case of *Bernhardt v. Perry*, 276 Mo., 612, 208 S. W. 462, the court denied the right

of the wife to recover, but in a very able dissenting opinion Chief Justice Bond in part said: "The injury suffered by a husband from the loss of the consortium of his wife is no more direct or immediate than that sustained by her from the loss of his society, aid and affection. Hence, there is no logical basis for the reason upon which some of the adverse rulings are based, that in such cases the injury sustained by the wife is not directly and proximately caused by the wrongful act preventing her husband from giving her the means of a livelihood—which it is his duty to provide—and from performing his conjugal duties."

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE OKLAHOMA BAR ASSOCIATION

The annual meeting of the Oklahoma Bar Association will be held in Oklahoma City, Dec. 30 and 31, 1921, at the Huckins Hotel.

The president's address will be made by Mr. Preston C. West, of Tulsa. The annual address will be given by Hon. W. L. Frierson.

There will be two papers: one by Mr. Russell G. Lowe, of Oklahoma City; the other by Mr. Irwin Donovan, of Muskogee. There will be the usual reports of committees; and the annual banquet will be held Thursday evening at 6:30.

PROGRAM OF THE MEETING OF THE VERMONT BAR ASSOCIATION.

The 44th annual meeting of the Vermont Bar Association will be held at Montpelier, Vermont, January 3-4, 1922.

At the afternoon session of January 3rd, the annual address will be delivered by the president, Hon. John W. Redmond, of Newport, Vermont. This will be followed by a memorial sketch of the life of the late Justice Seneca Haselton, by Hon. Robert Roberts, of Burlington. Also by a memorial sketch of the life of the late Hon. Charles A. Prouty, by Hon. George B. Young, of Montpelier, Vermont. The remainder of this afternoon session will be taken up with committee reports. The address at the evening session, which will be one of the chief events of the meeting, will be delivered by Hon. Alton B. Parker, of New York City.

The morning session of January 4th will be given over to further committee reports. Also at this session there will be a memorial sketch of the life of the late Chief Justice Loveland

Munson, by Hon. James K. Batchelder, of Bennington, Vermont. Justice George M. Powers, of the Supreme Court of Vermont, will also deliver an address.

At the banquet on the evening of January afternoon session, there will be a memorial sketch of the life of the late Superior Judge Zed S. Stanton, by Hon. Frank Plumley, of Northfield, Vermont. Hon. Hale K. Darling, of Burlington, Vermont, will also deliver an address on the subject of "Declaratory Judgments."

At the banquet on the evening of January 4th, speeches will be made, it is expected, by Governor James Hartness, of Springfield, Vermont, by Hon. Henry F. Hurlbutt, of Boston, Mass., by a representative of the Bar of Montreal, and by a member of the Court.

HUMOR OF THE LAW.

Mrs. Profitteer was very proud of her daughter's connection with a smart private school.

"My dear," she said to her friend, "she's learning civics, if you please."

"What's civics?" asked her friend.

"Civics?" My dear, don't you know? Why, it's the science of interfering in public affairs."
—*Argonaut*

"The poet says great men leave footprints in the sands of time."

"There are different kinds of footprints," rejoined Senator Sorghum, thoughtfully. "Some we observe in the hope of following them, and others we inspect like detectives looking for clues."—*Washington Star*.

An English clergyman, Father Black, spent a great deal of his time visiting prisons and trying to reform the inmates. On one occasion a housebreaker said to him gratefully: "I must thank you, sir, for what you have done for me. There was a time when I knew nothing of God or of the Devil either, but somehow you have made me love 'em both."—*Boston Transcript*.

"No! You cannot expect the jury to believe that," said the lawyer. "Do you really mean to say that although the night was pitch dark, and you were at one end of the train, you saw the deceased fall from the other? Now tell me, how far can you see at night?"

"Oh, about a million miles I reckon," retorted the witness, "I can see the moon—how far's that?"

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the
State Courts of Last Resort and of the Federal
Courts.

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1. **Accord and Satisfaction**—Full Settlement.—In an action by plaintiff for damages for non-delivery of one item of a bill of merchandise, draft having been tendered for other items, less deduction for non-delivery, in full settlement to date, acceptance of draft by defendant would have settled all claims growing out of the controversy, and a complete answer to plaintiff's cause of action and judgment would have gone against plaintiff for costs.—*Odwell v. Martin*, N. Y., 190 N. Y. S. 202.

2. **Agriculture**—Inferior Fertilizer.—In action for purchase price of fertilizers, where defendant counterclaimed that fertilizers were of an inferior quality, and not the standard guaranteed, and that by their use defendant had lost \$2,000 above the price of the fertilizers, it was error to permit testimony of one of the defendants that in his opinion the cause of the failure of his potato crop was the fertilizer, the warranty, if any, being as to the ingredients, and not as to results, and testimony being uncertain and speculative; and it was also error to admit testimony that defendants would have obtained better results on other crops if standard fertilizer had been used, and testimony as to size of crops in other years.—*Penniman v. Blank*, N. J., 115 Atl. 1.

3. **Aliens**—Ownership of Land.—The Fourteenth Amendment to the Constitution held not to give a citizen the right to sell or lease land to an alien prohibited by the laws of the state from acquiring land by purchase or lease.—*Terrace v. Thompson*, U. S. D. C., 274 Fed. 841.

4. **Automobiles**—Use by Son.—In an action for injury caused by defendant's son in negligently operating the father's automobile, held,

that an admission that the son was driving his father's car with the knowledge of the father justifies the inference that it was done with the father's consent.—*Duncan v. Overton*, N. C., 108 S. E. 387.

5. **Bankruptcy**—Exemptions.—Despite Comp. Laws Mich. 1915, § 12865, under sections 12861, 12862, bankrupt, who elected to take her exemptions in cash out of the proceeds of the sale of her stock of goods, held obliged to take the amount for which such exemptions sold, that is, the pro rata of the amount received as the proceeds of her assets at the sale; she not being entitled, no selection having been made by her of her exemptions, to the full amount of her exemptions as authorized by law.—*In re Moore*, U. S. D. C., 274 Fed. 645.

6. **Unauthorized Note**.—Where it was agreed between owner of a corporation and purchaser of its business, to enable purchaser to retain lease, that purchaser should buy the fixtures, lease and merchandise on hand, and that the owner of the corporation should pay the existing indebtedness and transfer the corporate stock to the purchaser, and such owner in part payment of the amount due from the purchaser, took notes executed by purchaser in the name of the corporation in an amount much less than the amount of indebtedness assumed, discounted the notes, and used the proceeds to pay the balance of the corporation's indebtedness, so that as a result of the transaction the indebtedness of the corporation was the amount of such notes, instead of the much greater indebtedness assumed, the corporation's trustee in bankruptcy could not recover amount of notes from former owner, on theory that he took the corporation's unauthorized notes to pay personal debt of such purchaser.—*Saperson v. Burstein*, U. S. C. C. A., 274 Fed. 797.

7. **Banks and Banking**—Liability of Directors.—The requirement of Banking Act, § 19, that the State Bank Commissioner report irregularities of any bank officer to the bank's directors does not limit the directors' liability for negligent mismanagement to cases where such report has been made to them; the purpose of the provision being rather to enlarge than to limit their liability.—*Creamery Package Mfg. Co. v. Wilhite*, Ark., 233 S. W. 710.

8. **Bills and Notes**—Misrepresentation.—The general rule is, where a party executes a note and signs a statement or makes representations that the obligation is valid, and there is no defense to it, he is estopped to resist payment, in an action by a person who has taken the paper relying on his representations, and he will be precluded from setting up a defense which would have been good as between the original parties. However, to render this rule operative the representations must be outside of the face of the obligation, and even though they are thus disconnected, if they are made simultaneous with the execution of the obligation, so that there is in effect but a single transaction, no estoppel will arise.—*Le Roy v. Meadows*, Okla., 200 Pac. 558.

9. **Brokers**—Fraud.—Purchasers from agent held entitled to rescind for fraud, and recover amount paid to agent who was to receive excess over fixed price.—*Berry v. Roth*, Minn., 184 N. W. 274.

10. **Carriers of Goods**—Bill of Lading.—Under Bills of Lading Act, Aug. 29, 1916, § 20, where a carrier loads package freight, like cotton in bales, it is required to state in the bill of lading only the number of packages and such marks or description as will serve to identify them, and a further statement in an order bill for baled cotton of the weight of the shipment is voluntary and gratuitous, and where qualified by the words "subject to correction," does not render the carrier liable to a holder of the bill,

under section 22 (section 8604 kk) for a shortage in the weight.—*Leigh Ellis & Co. v. Payne, U. S. D. C., 272 Fed. 443.*

11.—**Delivery.**—In an action for failure to deliver an express package, a receipt purporting to be from J. F. P. was not proof of delivery to Josie P., the consignee.—*American Ry. Express Co. v. Powell, Ala., 89 So. 546.*

12.—**Joint Rates.**—Where an express company filed a schedule of joint rates with another express company, a public utility commission may not, by striking out clauses of the schedule without notice or hearing, extend these joint rates, since to do so would amount to an institution of rates, while the utility commission is limited to a making of rates.—*American Ry. Express Co. v. Railroad Commission, U. S. D. C., 274 Fed. 649.*

13.—**Carriers of Passengers—Contributory Negligence.**—In an action for death occurring in New Jersey, the federal court follows the rule of the state court that, to entitle plaintiff to recover under the last clear chance doctrine, defendant's negligence must be so gross as to imply a disregard of consequences or a willingness to inflict injury.—*Houston v. Delaware, L. & W. R. Co., U. S. C. C. A., 274 Fed. 599.*

14.—**Due Care.**—Any one in proper condition, taking hold of the handle bar of an electric car, placing his foot on the step, and beginning to enter was a passenger, if the car was at a regular stopping place in the street for the purpose of receiving passengers, and persons were invited to enter and become passengers.—*Franz v. Holyoke St. Ry. Co., Mass., 132 N. E. 270.*

15.—**Certiorari—Laches.**—The established rule in civil service proceedings involving the holding of a position that an action is barred by laches unless review is brought by certiorari within six months does not apply to the review of proceedings for detachment of territory from a district where nothing has been done by the authorities which would cause great public inconvenience or detriment if the proceedings were quashed.—*Jackson v. Blair, Ill., 132 N. E. 221.*

16.—**Constitutional Law—City Ordinance.**—The provision of Const. S. D. art. 6, § 12, that "no law making any irrevocable grant of privileges, franchises or immunity shall be passed," held not violated by a city ordinance granting a franchise for a term of years to an electric company, including a contract fixing rates to be charged by the company.—*Water, Light & Power Co. v. City of Hot Springs, S. D., U. S. D. C., 274 Fed. 827.*

17.—**Mixed Marriages.**—Or. L. §§ 2163-2165, prohibiting marriages between white persons and Indians, Negroes, or Chinese, etc., are not unconstitutional as discriminating between the races.—*In re Paquet's Estate, Ore., 200 Pac. 911.*

18.—**Right of Assembly.**—The guaranties by Bill of Rights, § 16, of right of assembly and by sections 5 and 6 of free speech, which shall not be curtailed, are to "citizens," and so do not avail aliens.—*State v. Sinchuk, Conn., 115 Atl. 33.*

19.—**Contempt—Indirect.**—Although no battery was committed, an assault on a juror for returning a verdict adverse to defendant, by threatening gestures and abusive language, is sufficient, under C. S. § 984, to constitute an indirect contempt of court, as tending "to impede and hinder the proceedings of the court and to impair the respect and authority for the proceedings of the court."—*In re Fountain, N. C., 108 S. E. 342.*

20.—**Contracts—Breach.**—Where work was to be done according to plans and specifications on file, the owner, or the one engaging the work done, will be deemed to have warranted their sufficiency, and the contractor may recover, where they were changed and such change caused injury.—*Bates & Rogers Const. Co. v. Board of Com'rs, U. S. D. C., 274 Fed. 659.*

21.—**Covenants—Building Restrictions.**—In lot owner's suit to enjoin construction of a build-

ing too near the street line in violation of a building restriction, plaintiff's infractions in encroaching on the line to an extent of from 1 to 18 inches held to be minor infractions, not stopping them from enjoining a gross infraction of the restriction.—*McNair v. Raymond, Mich., 184 N. W. 412.*

22.—**Divorce—Injunction.**—Where a husband is shown not to have acquired the necessary residence in another state to prosecute his suit for divorce against plaintiff, he may be enjoined from carrying on such suit.—*Gwathmey v. Gwathmey, N. Y., 190 N. Y. S. 199.*

23.—**Insanity.**—Laws 1921, c 63, amending C. S. § 1659, subd. 4, providing that suit by the party injured for divorce may be maintained where separation for five years has been by mutual consent, or wrongful act of at least one of the parties, or by judicial decree, does not apply to separation from confinement in the state hospital for the insane because of insanity.—*Lee v. Lee, N. C., 108 S. E. 352.*

24.—**Fences—Repair.**—In action against adjoining owner for damage to cattle caused by defendant's breach of agreement to keep his portion of division fence in repair, involving a question as to existence of agreement, defendant's action in repairing a part of his portion of fence, on plaintiff's notice to him that plaintiff's cattle were going through fence, and in repairing the other part of such portion after plaintiff's cattle had been injured, held to warrant jury finding that repairs were made pursuant to such an agreement.—*Osgood v. Names, Iowa, 184 N. W. 331.*

25.—**Fraudulent Conveyances—Insolvency.**—Where an insolvent made payments on property held by his wife, such payments were fraudulent as to his creditors, and in a creditor's suit against him and the wife it was not error to decree that the property should be subjected to the payment of such sums.—*McKey v. McCold, Ill., 132 N. E. 233.*

26.—**Highways—Duty of Automobilist.**—If the vision of an automobilist was obscured by the glaring lights of an approaching car, it was his duty to slacken his speed and have his car under such control that he might stop it immediately, if necessary.—*Budnick v. Petersen, Mich., 184 N. W. 493.*

27.—**Innkeepers—Negligence.**—The fact that a plaintiff at the time he suffers injury to his person and property from the negligence of the defendant was doing some unlawful act will not prevent a recovery unless the act was of such a character as would voluntarily tend to produce the injury.—*Jones v. Bland, N. C., 108 S. E. 344.*

28.—**Insurance—Change of Beneficiary.**—Where assured agreed with his wife that she should receive the beneficial interest in the certificate of insurance upon and by reason of payments by her of the premiums, such contract was binding on the assured and deprived him of the right to change the beneficiary without her consent.—*Columbian Circle v. Mudra, Ill., 132 N. E. 213.*

29.—**Option.**—A contract of sale of an insured house which was but an option, did not pass any title or interest in the property to the grantee and did not divest insured of title to the property within a provision that the policy should be void on change in title or interest of insured.—*Home Ins. Co. v. Chowning, Ky., 233 S. W. 731.*

30.—**Surety Bonds.**—Where a street paving contractor's surety, though in the hands of receivers, had not been declared insolvent, such contractor, on executing new surety bonds in another company at the city's request, could not recover from the receivers the total unearned premiums on the old bonds from the date of the receivership, in the absence of evidence of any default thereon or of the surety's inability to pay in case of such default, but the new bonds having been substituted with the consent of the court and receivers with the understand-

ing that by their execution the company and its receivers were released from further liability, the contractor could recover the amount paid for the new bonds.—*Barber Asphalt Paving Co. v. Poe, Md.* 115 Atl. 24.

31. **Intoxicating Liquors—Intent.**—Under the Constitution and statute laws of this state, the sale and keeping for sale of all intoxicating beverages is prohibited. The Legislature, in the exercise of its police power, has the right to prohibit and has prohibited the sale and keeping for sale of wine, ale, beer and substitutes therefor, not necessarily intoxicating.—*Coury v. State, Okla.*, 200 Pac. 871.

32. **Substantial Evidence.**—The fact that the purchaser of whisky from defendant, charged with violation of the War-Time Prohibition Act, was employed and paid by the Dry Maintenance League to obtain evidence of the violation of the act, did not disqualify him as a witness or prevent a conviction on his uncorroborated testimony.—*Rose v. United States, U. S. C. C. A.*, 274 Fed. 245.

33. **Tax.**—The penalty of from \$500 to \$1,000 a day imposed by Act Ky. March 12, 1920 (Laws 1920, c. 13), for non-payment of the tax thereby imposed on the business of owning and storing spirits in bonded warehouse and removing them therefrom is oppressive in the absence of any provision for an opportunity to test the law, especially as the penalty for willful refusal to pay the tax on 10,000 gallons could not be more than twice as much as it must be for careless neglect to pay on one gallon.—*J. & A. Frieberg Co. v. Dawson, U. S. D. C.*, 274 Fed. 420.

34. **Use of Property.**—To show constructive notice which will render subject to forfeiture land used by tenant in possession in connection with manufacturing of prohibited liquors under Acts 1919, p. 12, § 12, the state must show a state of facts that would put a prudent owner upon inquiry and which would lead to the discovery of such facts as would lead to a knowledge of the existence of the apparatus or appliances used.—*State v. Jebeles, Ala.*, 89 So. 547.

35. **Life Estates—Use of Land.**—A tenant holding under a devise of land "during widowhood" has the right to use the land and pine trees growing thereon by hacking and otherwise working the trees for turpentine purposes, as against a person entitled in reversion, where prior to his death the testator used the land and trees for such purposes.—*Lee & Bradshaw v. Rogers, Ga.*, 103 S. E. 371.

36. **Mandamus—Election Contest.**—Where an order sustaining a special demurrer to a petition in a contest of a primary election was not appealable and the conditions show a right to mandamus, and where a determination of an appeal from a dismissal of the action would be too late for the election, a writ of mandamus is the only effective remedy and will issue.—*Williams v. Howard, Ky.*, 233 S. W. 753.

37. **Master and Servant—Assumption of Risk.**—Under Act April 22, 1908, §§ 3, 4; Act April 14, 1910, § 2, and Act March 2, 1893, § 8, a railroad company's duty to equip and maintain cars with sufficient and adequate brakes was an absolute one, and if it failed to do so an injured brakeman's contributory negligence or assumption of risk was immaterial.—*Payne v. Connor, U. S. C. C. A.*, 274 Fed. 497.

38. **Recovery.**—Under Workmen's Compensation Act providing that, where injuries are caused by third persons, an employer, having paid the compensation or become liable therefor, may recover in his own name or that of the employee from the person in whom liability exists, an employer, who has neither paid nor become liable to pay, has no right of action, in his own behalf nor for the indemnity company which paid the award, against a third person causing injury to an employee.—*Henderson Tel. & Tel. Co. v. Owensboro Home Tel. & Tel. Co., Ky.*, 233 S. W. 743.

39. **Municipal Corporations—Abutting Ownership.**—Such abutting owner has exclusive right

to the soil, subject only, in general, to the easement or the right of passage in the public and the incidental right of properly fitting the street or highway for use and keeping it so. 2 Elliott on Roads and Streets (3d Ed.) 311, § 876, note 6. In other words, such proprietor has all the usual rights and remedies of the owner of the freehold, subject only to the public easement; and the trees growing thereon belong to him, unless needed to repair the way.—*Long v. Faulkner, Ga.*, 108 S. E. 370.

40. **Negligence.**—A city, in collecting, distributing and vending water being engaged in the management of its property for its own corporate benefit or profit and that of its inhabitants, cannot plead governmental immunity for injuries caused by the negligent acts of one employed by it to guard a municipal reservoir.—*Richmond v. City of Norwich, Conn.*, 115 Atl. 11.

41. **Void Assessment.**—Equity will enjoin collection of special assessment for repair or reconstruction of pavement where absolutely void, but not where the assessment is merely voidable, since in such case the statutory remedy by filing objection with the city council under Code, § 824, must be pursued.—*Manning v. City of Ames, Iowa*, 184 N. W. 347.

42. **Navigable Waters—Riparian Rights.**—An application by a riparian owner for an order fixing damages for decrease in rental value and arrested development on account of pollution of a stream on the claim that conditions had changed since a decree was entered refusing an injunction and providing for payments to riparian owners at stated times, while the pollution continued, must be denied where there is no showing of change in conditions since the decree.—*Doremus v. City of Paterson, N. J.*, 115 Atl. 3.

43. **Negligence—Contributory Negligence.**—Under the federal Employers' Liability Act, all recovery is not barred by the fact of the employee's contributory negligence being gross and that of the employer being slight.—*Fumpleton v. Charleston & W. C. Ry. Co., S. C.*, 108 S. E. 363.

44. **Imputability.**—The negligence of the driver of an automobile was not so clearly imputable as matter of law to an employee of the driver, riding in the rear seat on an errand of her own, and testifying that she had nothing to do with driving the car and had never driven one, as to warrant the affirmation of a judgment on a directed verdict for defendant, where the question of imputed negligence had not been considered by the trial court.—*Begert v. Payne, U. S. C. C. A.*, 274 Fed. 784.

45. **Perpetuities—Life Beneficiaries.**—A trust deed directing the trustee to pay half the income from the trust property to grantor and one-fourth to each of two other beneficiaries during their respective lives, and at the death of each beneficiary to convey a like proportion to her heirs at law, did not create an unlawful perpetuity, though there was no direction to separate the corpus into three parts, separate trusts being created for each life beneficiary, each to continue for only one life in being, and each beneficiary's proportionate share of the corpus being freed from the trust and becoming alienable on her death, so that their interests were separate, though the trust property was to be administered in solido.—*Cary v. Carman, N. Y.*, 190 N. Y. 193.

46. **Physicians and Surgeons—X-Ray.**—In an action against a physician for injuries caused by X-ray machine, where question was safety of machine, and not its efficiency, and all experts testified that the machine used was all right so far as safety was concerned when used with proper safety devices, there was no necessity for submitting to the jury any issue involving the exercise of care and knowledge in the selection of a machine.—*Street v. Hodgson, Md.*, 115 Atl. 27.

47. **Railroads—Contributory Negligence.**—Omission of one working on a crane on a rail-

road track to place red flags several hundred feet distant from the crane, between it and any approaching train a duty imposed upon him, although a fact which, with other facts, may be considered by the jury as showing contributory negligence, did not constitute contributory negligence as matter of law.—*London Guarantee & Accident Co. v. Southern Pacific Co.*, Cal., 200 Pac. 805.

48. **Taxation**—"Discrimination."—Act denying to national bank shareholders exemption of federal securities held by corporation as assets held not discriminatory in favor of private bankers.—*Des Moines Nat. Bank v. Fairweather*, Iowa, 184 N. W. 313.

49. **Sales**—Breach of Warranty.—The purchaser of goods, being liable for the price on his election to retain the property, does not waive a breach of warranty by promising unconditionally to pay for the goods subsequently to the breach, though his promise is a circumstance for the jury to consider on the question whether or not there has actually been a breach.—*Parrott Tractor Co. v. Brownfield*, Ark., 233 S. W. 706.

50. **Breach of Contract**.—In an action for breach of a contract to buy cocoanut oil, where defendant failed to give shipping instructions and to furnish a bank credit, as agreed, it was not necessary for the plaintiff, in order to show readiness to deliver the oil, to establish that he had it in stock; defendant's breach of contract excusing further performance by plaintiff, of whom was required only such readiness as was necessary to enable him to make delivery at the time fixed for delivery, such oil being obtainable in the market at the time fixed for delivery.—*Krauter v. Simonin*, U. S. C. C. A., 274 Fed. 791.

51. **Implied Warranty**.—Where fertilizer is sold by the manufacturer, a stronger warranty is implied than in the ordinary sale of goods that the fertilizer was reasonably adapted to the purposes for which it is purchased, and this implied warranty is independent of the manufacturer's negligence.—*Patterson v. Orangeburg Fertilizer Co.*, S. C., 108 S. E. 401.

52. **Specific Performance**—Undisclosed Principal.—The fact that the statute of frauds is involved does not prevent an undisclosed principal enforcing a written contract made for him by his agent in his agent's name.—*Lagumis v. Gerard*, N. Y., 190 N. Y. S. 207.

53. **Street Railroads**—Contributory Negligence.—A practical and reasonable construction of Motor Vehicle Act, § 20, as amended by St. 1919, p. 216, providing for signals on changing direction, does not require the driver of a motor vehicle upon every deviation from a direct course ahead to look back to ascertain the condition of traffic behind him; such situations being covered by duty to use ordinary care.—*Noce v. United Railroads*, Cal., 200 Pac. 919.

54. **Sunday**—Photographers.—Sunday observance statute held legitimate exercise of police power when applied to photographers.—*State v. Dean*, Minn., 184 N. W. 275.

55. **Trusts**—Liability of Surety.—Where the corpus of a trust was managed by a resident trustee, and had never been in the control of foreign trustee, whose only duty was to forward the income to the cestui que trust after the resident trustee sent it to him, and who, on failure of the resident trustee to send the income, gave prompt notice of the failure, the foreign trustee is not liable for default of the resident trustee.—*Broome v. Mordecai*, S. C., 108 S. E. 407.

56. **Vendor and Purchaser**—Fraud.—In vendor's action to set aside, for fraud, contract to sell land at \$200 per acre, in which it was claimed that plaintiff had been fraudulently induced by administrator of her father's estate to sell the land which she had inherited from her father for an inadequate price, evidence that the land was worth \$250 an acre held insufficient to warrant submission of case to jury.—*Herwehe v. Schultz*, Iowa, 184 N. W. 289.

57. **Wills**—Bequest of Employee.—An electrician occupying with his family a cottage on testator's estate and performing services in connection with the electrical equipment of the premises, held within the bequest to each person who at testator's death should be "in my service and . . . customarily employed as a part of my household in my country house."—*Givens v. Whitney*, N. Y. 190 N. Y. S. 177.

58. **Contracts To Devise Property Legal**.—It is competent for a parent to contract with a child that, if the child will care for certain land and pay an annuity to the parent, the latter will devise such land to the child at his death, and the parent has no lawful right, after partial performance of the agreement on the part of the child, to alter his will so as to reduce the acreage of the place to be devised.—*Goodwin v. Cornelius*, Ore., 200 Pac. 915.

59. **Dower**.—Where a bequest of the income of two-thirds of the residuary estate for benefit of the testator's widow was declared to be in lieu of dower, and the only change by codicil, by which the testator ratified and confirmed his will in every respect, says so far as any part was inconsistent with the codicil, was to limit the right of the wife to income so long as she remained a widow, the provisions as to dower are not inconsistent, and the codicil does not affect the will, so as to entitle the widow to dower in addition to the income.—*In re Valentine's Will*, N. Y., 190 N. Y. S. 155.

60. **Estoppel**.—Where a will specifically provides that if any beneficiary should contest it, the bequest to such person should be revoked, a legatee, who has received his legacy and executed his release of all claim against the estate, is estopped from attacking the will.—*King v. Rockwell*, N. J., 115 Atl. 40.

61. **Gift Over**.—A gift over to a church in case the first taker, testator's son, dies "during his minority, or childless," in the absence of anything else in the will to show a different intention, is to be read as though "or" were "and," so that the son becomes absolutely owner on attaining majority.—*Williams v. Hicks*, N. C., 108 S. E. 394.

62. **"Heirs"**.—The word "heirs," both in its ordinary and in its technical signification, denotes those who take a person's real estate by inheritance upon his death, and when used in a will it will be given that meaning, unless the context and the circumstances under which it is employed indicate a different purpose.—*Sherburne v. Howland*, Mass., 132 N. E. 188.

63. **Remainders**.—"On the death of my wife," "at the death of my wife," and like expressions in wills creating life estates denote the time or event on which remaindermen come into the right of possession and enjoyment, and do not control the time when the remainder vests.—*Dowd v. Scally*, Iowa, 184 N. W. 340.

64. **Construction**.—Wife's will giving her property to her husband in trust to keep the same together for and during his natural life, to manage, control, and use it for the benefit of the children, with authority to use the income and to sell or mortgage any or all of the property according to his own judgment and discretion, without being accountable to the children, and providing that on husband's death the property "then left" should go to the children "then living," did not give the children an inheritable estate as of the time of the wife's death, but vested a life estate in the husband, it having been wife's apparent intention that husband, as well as children should participate in the income.—*Bingham v. Sumner*, Ala., 89 So. 479.

65. **Undue Influence**.—The mere fact that a trusted attorney of a testator, who bequeathed his property to a church of which both attorney and testator were devout members, drew the will and was named therein as executor, does not constitute the attorney a beneficiary under the will, nor raise a presumption of undue influence.—*Kindt v. Parmenter*, Okla., 200 Pac. 706.

Central Law Journal.

St. Louis, Mo., December 23, 1921.

RIGHT TO INDUCE EMPLOYEES TO BREACH THEIR CONTRACT OF SERV- ICE BY BECOMING MEMBERS OF A LABOR UNION.

Attention is again directed to the world-old struggle between employer and employed by recent decisions of the courts, among which is *Cyrus Currier & Sons v. International Moulders' Union*, decided by the Court of Chancery of New Jersey, and reported in 115 Atl. 66. During the late war union labor made rapid progress in the acquisition of numbers and advantages, which it is now striving to hold. In the present period of depression employers are seeking to firmly establish the open shop.

The closed shop, made so without the consent of the employer freely given, is opposed to the fundamentals of democracy. It is class government in a crude state, which, in the ultimate is tyranny.

On the other hand, it is equally unjust, for the same reason, for the employer to seek to prevent his employees from following freely their right to organize and to bargain collectively, provided their purposes are legal. The right to organize for self-betterment is clear; but organization for the purpose of coercing another into doing that which he has a right to refuse to do, is illegal.

The employer frequently resorts to the courts; labor but seldom. The power of brawn has been labor's chief weapon. But the time may come when the unions will find it expedient to adopt "quality" as their motto and slogan; when to be a member of a trade union will mean that the man is qualified and skilled in his trade, and has had to stand a strict test of his qualifications in order to become a member of the union, and that he stands ready to render a fair day's work in the exercise to the full of his skill. When the unions stand

solely for ability and honesty in their several callings, employers will, for their own welfare and protection, seek them out, and require none but union labor.

As the situation stands today, the position of neither side appeals to the unbiased mind. In other words, neither side seems to be trying to do the fair thing. Said the Court in the case mentioned above: "Labor has not as yet appealed to the courts, but if the present 'employer's closed shop' movement has for its ultimate object the overthrow and destruction of organized labor—an ulterior and unlawful object—and, by means as unworthy as those here reprehended, capital is certainly extending the invitation."

The *Cyrus Currier* case, *supra*, involved the improper solicitation of the complainant's employees to join the defendant union. The facts showed that plaintiff made it a condition of employment that his employees should not join the union. Upon their joining, his custom was to discharge them. The Court found that the labor union solicited plaintiff's employees by persuasion, and in some cases by force and violence, to join the union, with the intent to have them break their contracts of employment.

The Court clearly states the rights of the respective parties as follows: "The complainant asks more: That the defendants be restrained from soliciting the complainant's employees to join the union with intent to have them breach their contract of service. I am of the opinion that it is also entitled to this relief. It is the complainant's legal right to hire men unaffiliated with labor unions, and to make continuance of unaffiliation a condition of the employment. That is as assured to the employer as is the right of the unions to make it a condition of membership that their members shall not work in shops where non-union men are employed. And it is the master's legal right to have his servants abide with him, free from interference of the union, as it is the right of the union,

to prosper unmolested by the employer. The right of each to lawfully prosecute his affairs is equally within the protection of the law, and if in their competition for labor harm falls to one from the lawful promotion of the other's business the injury is an inevitable incident, legitimately inflicted and excusable. So long as each keeps advancing his interest without purposely intending to harm the other, there is no room for complaint or cause for action; but when either converges the line of advance in assault upon the other, then the law, through its courts, calls a halt by injunction. In other words, in their progress they must not step on the other's toes with intent to injure."

A much similar decision was rendered by the Supreme Court of the United States in *Hitchman Coal & Coke Co. v. Mitchell* (245 U. S., 229), Mr. Justice Pitney writing the opinion, upon which the Court of Chancery of New Jersey chiefly relies.

NOTES OF IMPORTANT DECISIONS.

PAYMENT OF STAMP TAX AS CONDITION PRECEDENT TO TRANSFER OF STOCK.—

Holding that payment of the stamp tax required by §§ 270-278 of the New York Tax Law, is not a condition precedent to action to compel a corporation to transfer corporate stock on its books, the New York Court of Appeals in, *Luitwieler v. Luitwieler Pumping Engine Co.*, 132 N. E. 401, said:

"We held in *Bean v. Flint*, 204 N. Y. 153, 97 N. E. 490, that the payment of the stamp tax required by §§ 270-278 of the Tax Law does not create a condition precedent and that the failure to pay the tax is a matter to be pleaded as a defense. Nothing can be added to what *Hiscock, J.*, said in that case. We think the rulings below are contrary to the rule there laid down. As stated, no such defense was pleaded, a motion to amend the answer so as to set up a defense was withdrawn, and the certificates of stock and transfer to the plaintiff were kept in the evidence by the statement of counsel that he withdrew his motion to strike them out. Under such circumstances we think, upon the proof as offered, the court could have granted judgment for

the plaintiff directing a transfer upon the books of the company when the certificates were presented properly stamped or upon payment of the tax. *Phelps-Stokes Estates v. Nixon*, 222 N. Y. 93, 118 N. E. 241; *Waddle v. Cabana*, 220 N. Y. 18-27, 114 N. E. 1054.

"The object of all these tax provisions is to get money for the state. When the only question presented is the right to have stock transferred upon the books of a corporation, the state is fully protected, if the stamps are annexed or the tax paid at or before the time the transfer is made."

STATUTE PROHIBITING STRIKES HELD VALID.—The case of *People v. United Mine Workers of America*, Colo., 201 Pac. 54, holds valid a statute prohibiting strikes and lockouts in industries affected with a public interest during an investigation, hearing, or arbitration of a dispute by the Industrial Commission. The case holds, too, that coal mining is an industry affected with a public interest. In part the Court said:

"Then, too, a business by circumstance and in its nature may arise from a private to a public concern. *German etc., Co. v. Kansas*, 233 U. S. 411, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, and since the decision of the *Morgan* case (1899) the rapid development of the relations of the coal miners, the coal operators, and the public have produced a situation very different from that which then existed. Because of these considerations we do not think that the *Morgan* case controls this one. * * * One reason for holding a business to be affected with a public interest is that it is a practical monopoly. *German etc., Co. v. Kansas*, 233 U. S. 389, 416, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; *Budd v. New York*, 143 U. S. 517, 537, 12 Sup. Ct. 468, 36 L. Ed. 247; *Nash v. Page*, 80 Ky. 539, 545, 44 Am. Rep. 490.

"There can be no question that the production of coal is, at the present time, affected with a public interest to a certainty, and an extent not less than any other industry; consequently coal mining is within the terms of chapter 180, S. L. 1915, and it follows that that statute does not violate any constitutional provision as to due process or liberty of contract, as appears from the cases cited above.

"There is no involuntary servitude under this act. Any individual workman may quit at will for any reason or no reason. There is not even prohibition of strike. The only thing forbidden is a strike before or during the Commission's action.

"It is objected that section 33 of the act in question, forbidding incitement to lockout or strike, violates article 2, § 10, of the state constitution, concerning freedom of speech; but, if the legislature has power to forbid anything, it has power to forbid incitement thereto. See R. S. 1908, § 1620, on accessories."

LIABILITY OF A STATE DEPARTMENT EX DELICTO.

That the principle of the common law "The King can do no wrong" is still active, was very strikingly brought out in the recent case of *Macgregor v. The Lord Advocate*.¹ We propose to detail the principles of that decision as its references to the liability of State Departments may be not without interest to practitioners elsewhere.

The plaintiff (or pursuer to use the Scots law term) brought an action against the Lord Advocate as representing the War Department and against Robert Macfarlane, sergeant, 614 Motor Transport Company, Royal Army Service Corps, concluding for payment of £2100 by the defenders conjunctly and severally, as reparation for personal injuries sustained by him through being run down by a motor car belonging to the War Department, and driven in the course of his duty by the other defender. The pursuer averred that he was run down through the fault of the defender Macfarlane, a servant of the War Department.

The Lord Advocate, as representing the War Department, pleaded that the action, insofar as laid against him, should be dismissed as incompetent.

This plea was based on the constitutional principle that a department of state cannot be sued in an action claiming damages for a wrong. Each department of state, it was said, is a branch of the Government; the Government, constitutionally, is the sovereign, and the sovereign can do no wrong, personally or by any of his Ministers, cognisable in a court of law.

It was conceded by the pursuer's counsel that this constitutional principle is recognized in England.² Redress, in Eng-

land, may be had by a subject against the Crown, only where the claim is for implementation of a contract, or for damages in respect of breach of contract,³ and then the subject must proceed, not by ordinary action, but by petition of right.

There is no reference to this question in any of the institutional treatises on the law of Scotland, nor is there any Scottish case which expressly decides the point maintained by the Lord Advocate. There are, however, judicial dicta which support the view contended for on behalf of the War Department. In the case of *Smith*,⁴ a bombardier raised an action against the Lord Advocate, as representing the War Department, in which he concluded, *inter alia*, for damages in respect of wrongful acts of a court-martial by which he had been tried. The action failed, and the Lord Ordinary (Kincairney) in dealing with the claim for damages said at p. 121: "There remains the conclusion for £750 as damages for the wrongs which the pursuer has suffered through the illegal convictions of which he complains. Now, on this point, the question does not arise whether this Court could set aside the decrees of the court-martial complained of as *ultra vires* or incompetent. I am disposed to think that it could not. But I am not asked to interfere in that manner, for these illegal proceedings have already been set aside by competent military authorities. The pursuer does not challenge the proceedings of the military authorities, but rather founds on them, and maintains or may maintain that they prove conclusively that he has suffered a legal wrong. But the question is whether he can make any claim against the War Department for that wrong. He might probably have sued those members of the court-martial who did the wrong, if it could be shown that their proceedings were incompetent

(1) 1921, 2 S. L. T. 174.

(2) *Feather*, 6 B. & S. 257. *Tobin*, 16 C. B. N. S. 310; *Canterbury*, 1 Phillips 321; *Addison on Torts*, 8th ed. 140; *Beven on Negligence*, I. 217, 220.

(3) *Thomas*, 1874, L. R., 10 Q. B. 31; *Windsor & Annapolis Railway Co.*, 1886, L. R., 11 A. C. 607.

(4) 25 R 112.

or ultra vires. But I am unable to see on what principle the War Department can be made liable. There is no authority for the proposition, that when a court falls into error or acts incompetently or exceeds its jurisdiction, any department of the state can be made answerable. There is no reason why there should be such liability for the errors of courts-martial more than the errors of other civil or criminal courts. It is said that the War Department is liable for the faults of the officers who formed the courts-martial as being the servants of the War Department; the answer is that they were not the servants of the War Department but the servants of the Crown; and, if it be said that this action, although nominally against the War Department, is really against the Crown, the conclusive answer appears to be that the Crown cannot be sued for wrong done by itself or its servants.

"It is settled, indeed, that an action will lie against the Crown on a contract entered into by the servants of the Crown, or for breach of contract by the servants of the Crown.⁵ In these cases it was, I think, clearly recognised that the Crown could not be made liable in damages for wrong or delict or quasi-delict. Nor, it is thought, can it be liable where the damage has arisen from the negligence of the servants of the Crown.⁶ Questions of delicacy may arise in applying this principle, but I am unable to think that there is any doubt that neither the Crown nor any public department can be made liable for the blunders of a court or of the officers supposing themselves to form a court or of the Commander-in-Chief of the forces in India.

"On the whole I am satisfied that the present case cannot be supported in any of its parts and that the defender is entitl-

ed to absolver." The Second Division adhered, and Lord Young, at p. 123, made these observations as to the conclusion for damages: I omitted to refer to the conclusion for damages. What I have to say upon that is, that while any servant in the public service may have an action for damages against any individual who has done him a wrong, even in connection with military service, I know of no authority for a claim of damages against Her Majesty's Government, or any public department of Her Majesty's Government. Any individual in the public service may so treat another as to subject himself personally in damages, and the damages may be recovered in a court of law, but there is no authority for an action against the Government or a public department of the Government, which is the same thing, for all the departments of the Government just constitute the Government as representing Her Majesty."

In the case of *Wilson*,⁷ in which a regiment of volunteers and its commanding officer were sued for damages in respect of the death of a child killed by an ammunition wagon, the Lord Ordinary (Kyllachy) said, at p. 170:

"In this case I have come to the conclusion that the action cannot be sustained as against Colonel Mackay, as representing the volunteer regiment, and as holder and administrator of funds. These funds belong to the Government — that is to say, the Crown—and it is, I think an accepted doctrine that the Crown cannot be liable or sued for damages in respect of the 'torts'—the wrongful act of its officers. I therefore propose to dismiss the action so far as directed against Colonel MacKay as representing the regiment."

This part of the Lord Ordinary's decision was reversed, but the general proposition laid down by the Lord Ordinary was not challenged.

(5) *Thomas v. The Queen*, 10 Q. B. 43; *Windsor Railway Co. v. The Queen*, L. R. 11 App. Cas. 614.

(6) *Viscount Canterbury v. Attorney General*, 1842, 1 Phillip Ch. Cas. 306; *Lord Advocate v. Hamilton*, 29 S. L. R. 213.

(7) 7 F. 163.

The Court followed the English decisions and the dicta in the Scottish cases referred to, with the result that the pursuer's claim was dismissed. It is interesting to note that when delivering judgment, Lord Salvesen, one of the strongest judges of the Inner House, made the following observations:

"If this question were open the argument for the reclaimer (pursuer) would be almost irresistible. No reason has been suggested why a department of state should not be answerable, like a municipal corporation, or any ordinary employer, for the conduct of its business. The present state of the law, as it has been settled in England, does not appear to me to be satisfactory, because it leaves it in the option of a department to accept liability where it pleases, and to repudiate liability where pressure is not brought upon it, possibly from political sources, to accept liability. I do not think it is desirable, from the point of view of public policy, that a department should be in that position, and it may well be that the present state of matters ought to be the subject of legislative amendment.

"Treating this as a pure question of the common law of Scotland, however, I think it is settled by authority. The law of England seems to have been settled for a long period, and it is substantially to the effect that, while the Crown may, after certain procedure, be sued for breach of contract, it cannot be sued for the negligence of a servant of the Crown. Authoritative pronouncements in Scotland are extremely meagre; but, such as they are, they seem to have followed the English rule, that rule being originally derived from a doctrine that is no longer accepted, viz., the doctrine that the King can do no wrong."

DONALD MACKAY.

Glasgow, Scotland.

THE DUTY AND RESPONSIBILITY OF THE BAR IN THE SELECTION OF THE JUDICIARY.

Not least in importance among the duties and responsibilities of the Bar is the education of the electorate to a realization of the truth that learning in the law is indispensable and that no amount of popularity or good intentions can be a substitute. This education of the people is only practicable by means of constant and systematic propaganda. All classes should have deeply impressed upon their minds, first, that the courts afford the only effective and real protection or security for their personal liberty and their property; secondly, that this can only be maintained if justice be administered competently, uniformly, consistently and impartially and always according to the law, and, thirdly, that a judge who has a mere smattering of law is dangerous to any community, for half-knowledge is frequently worse than ignorance.

A special and urgent duty of education and propaganda rests upon the Bar of the present generation. Women recently enfranchised now constitute more than one-half of the voters of the country, and they have little, if any, tradition of what I shall term the political instinct to guide them. It is not an exaggeration to say that women voters generally have no definite conception of the vital importance to all classes of expert service on the bench and of adherence by our judges to the settled rules of law. It is easy for men and women to grasp the idea that a judge should be honest and impartial; that is instinctively realized. But few have any conception of the truth that justice according to law is what all must strive to secure and uphold as distinguished from what is expressed in such catching phrases as "Justice without law," or "Justice without regard to the technical rules or precedents of the past."

Another consideration which is peculiar to our own day and has greatly increased

the duty and responsibility of the Bar in the selection of judges is the introduction of the primary system of direct nominations. Mr. Chief Justice Taft declared in an address several years ago that "Of all the evils which are supposed to be a cure for all evils, the direct primary is the worst. * * * As an example of what the primaries can do, I will say that they have already seriously impaired the standard of the judiciary."

There can be no doubt that the qualities required in a candidate for judicial office should be knowledge of the law, love of justice, probity, impartiality, independence and dignity, and that mere popularity, or what is so often necessary to popularity, good-fellowship, is the last quality we look for in a judge. The self-seeker and self-advertiser—the man who will go around soliciting signatures to a nominating petition and then campaign for support in the primaries, is seldom qualified by temperament or character for judicial office and seldom has the self-respect and dignity which we expect in a judge.

Before a judicial candidate can be intelligently and wisely selected, there should be a most thorough investigation and exchange of views as to his professional scholarship and repute, his practical training and experience and his character; the question of his popularity should only be secondarily considered, if at all. A proper test is much more likely to be applied when there is responsible party government and nomination by an executive directly responsible to the people or by a majority of responsible representatives present in a public convention and discussing and debating, if need be, the relative merits of candidates. Such investigation and discussion before the filing of designating certificates is seldom practicable under the direct primary system, particularly in populous communities.

In the State of New York the direct primary system has been in operation for ten years as to justices of the State Supreme

Court and eight years as to judges of the Court of Appeals, and its practical operation has been unsatisfactory. It has also compelled greater activity on the part of the Bar in order to secure the renomination of judges who had competently and satisfactorily served an elective term and the selection and nomination of lawyers of learning, experience and character.

The election law of New York provided that, in order to become a candidate of any party for the office of judge of the Court of Appeals in the state-wide primaries, designating petitions had to be signed and acknowledged by at least three thousand enrolled voters of the particular party, and to become a candidate for the office of justice of the Supreme Court in any one of the nine judicial district primaries, designating petitions had to be signed and acknowledged by at least fifteen hundred enrolled party voters.

It had long been the general policy of the Bar of the State of New York to urge and support the renomination and re-election on a non-partisan basis of all judges who had competently and satisfactorily served an elected term and who had upheld the independence, dignity and prestige of the Bench. This policy had tended to promote independence and impartiality in our judges, and to make them feel that their renomination and re-election would depend only upon the character of the judicial service they rendered and that they would not have to look to political organizations or groups for renomination if they desired to continue in judicial office. Public opinion, stimulated in greatest measure by the Bar, had impelled the two great parties to unite in the renomination of satisfactory judges, irrespective of party affiliation, although there had been some exceptions.

Under the new law, however, political conventions could not renominate; and, if a non-partisan renomination of a particular judge were deemed desirable, this meant that at least six thousand signatures had to be obtained in the case of a judge of the

Court of Appeals and three thousand in the case of a justice of the Supreme Court, simply in order to secure the printing of the candidate's name on the official primary ballots of the two great political parties. The labor of securing these signatures to nominating petitions and the expense for printing, notaries' fees, etc., were considerable, and, of course, no self-respecting judge would undertake to solicit signatures for renomination, or be willing to place himself under obligations to any one, even if he could personally afford the expense necessarily attending primary campaigns.

It was therefore realized that the new system imperatively imposed upon the Bar the duty to see to it that the necessary funds were raised by voluntary contributions and that the requisite signatures were obtained in order that the name of a judge whose renomination was desired might appear upon the official primary ballots. This meant that year after year, as long as the primary system continued, the Bar had to organize months before the primaries were held, prepare and print nominating petitions, and at great labor and expense obtain the necessary signatures. In fact, during the ten years that the direct primary system was in operation in the State of New York, the Judiciary Committee of the Association of the Bar of the City of New York was called upon, each time the renomination of a satisfactory judge was desired, to organize the machinery for securing the signatures of thousands of duly enrolled voters and employ notaries to solicit signatures at considerable expense, and the supervision of this work required months of preparation and constant attention by the Judiciary Committee, notwithstanding the fact in some instances that there was no doubt of the general desire to re-elect particular judges upon a non-partisan basis and thereby ensure their continuance on the Bench, and that the political leaders were agreed that this should be done.

Many thoughtful observers among the members of the New York Bar became convinced that the practical operation of the direct primary system had refuted the assumptions, hopes and promises with which the advent of this so-called reform had been urged and heralded. It had been assumed, in the face of all practical experience to the contrary, that if the voters had direct power, and other methods of nominating candidates were abolished, they would perform their political duties more actively, that better qualified and more competent and independent candidates would then offer themselves or somehow would be brought to the attention of the electorate, and that nominations would then represent the choice of the majority in each party, and not that of minorities or of political bosses. How the majority were to ascertain the qualifications of possible candidates in populous districts, or co-operate to secure the nomination of the best qualified, was left quite in the air. It seemed to be conceived that the people would instinctively seek and by some process of political inspiration would intuitively discern and select for public office the best qualified persons in the community.

In populous constituencies, such as the State or City of New York, with hundreds of thousands of enrolled voters, it seems almost unreasonable to have expected that the direct primary system would be more likely to secure competent and trustworthy candidates than the old method of nominating at public conventions composed of responsible representatives of the voters from each election district. In the State of New York the result of the direct primary system has not only been to increase the power of the so-called political machines and the bosses, but to render them irresponsible and to impair party discipline. If an unfit and improper nomination is made, the leaders can disclaim responsibility by pleading that the primary had declared the will of the majority.

In the face of this practical experience and a fair and sufficient trial of the direct primary system, the New York legislature has this year wisely concluded that the best and permanent interests of the State would be promoted by restoring the nominating convention for state officers, including judges of the Court of Appeals and justices of the Supreme Court, and accordingly this was so enacted.

It was undoubtedly true that there had been grave abuses in the convention system, that conventions at times had been improperly conducted, and that the scandals in connection with contested seats had become intolerable. But there had been no form of abuse that could not have been remedied by appropriate legislation. Moreover, the control of nominating conventions was at all times in the hands of the majority of the voters if they would only take the trouble to enroll and vote at the primary elections for competent and honest delegates. The rights of delegates could readily have been safeguarded by law, and the abuses arising from contested seats could have been prevented by giving the certified delegates an absolute right to their seats subject to review only by the courts, as has been done in the New York legislation enacted this year.

In final analysis, there will be found to be no protection or remedy against fraud or corruption in nominating candidates for public office equal to the participation in politics of the majority of voters as an imperative duty of citizenship. Our political rights cannot be preserved except by our own active and constant vigilance. In this respect we get just what we deserve. The idea that the direct primary would in and of itself tend to stimulate greater participation in nominations or to eliminate the professional politician or the boss has been shown to be erroneous in almost every State where the scheme has been tried. In fact, quite the contrary has been the ultimate result

in many instances, and it may truly be said that the present condition of nominating machinery under direct primaries is in practice and result much more objectionable than the old system.

The great public service rendered by the Chicago Bar Association in connection with the elections held last June shows quite conclusively the useful public service that can be rendered and the controlling influence that can be exercised by Bar Associations. The success of the movement initiated by the Bar of Chicago was complete, astonishing and inspiring, and their example should be emulated. The twenty candidates for judicial office who were endorsed by the Bar of Chicago were elected and most of them by majorities of over 100,000 votes. The Bar of that city was assessed for the necessary expenses of this campaign, and it voluntarily raised and expended a fund of more than \$100,000. The whole campaign was fought on the highest plane, and the issue was the protection of the Bench from possible domination by and subserviency to any political organizations.

The Association of the Bar of the City of New York has long had a standing committee known as the Committee on the Judiciary, and the jurisdiction and duties of this committee are prescribed in the by-laws as follows:

"A Committee on the judiciary, which shall consist of nine members. It shall be charged with the duty of observing the practical working of the courts of record, both civil and criminal, and of making such recommendations to the Association with respect thereto as it may deem advisable.

"It shall consider the fitness of candidates nominated or proposed for election or for appointment to judicial office or to any office connected with the administration of justice in the courts of record, and shall confer on that subject with other organizations, and with nominating conventions or

committees, and, in the case of candidates for appointment to any such office, with the public officer in whom the power is vested, and shall recommend to the Association, at a special meeting or otherwise, such action in respect to candidates as it may deem advisable."

This committee has systematically investigated the administration of justice in the City of New York, the character of the judicial service rendered by judges, and the qualifications of candidates for judicial offices, reporting from time to time to the Association. It has been constantly active, always ready to hear and investigate complaints, and before each election has carefully reviewed at length the training and qualifications of candidates and made appropriate recommendations, which have generally been approved and endorsed by the Association.

The work of such a committee in large centres must be at times quite laborious and engrossing; and it must always be a difficult and delicate task for lawyers to pass in judgment upon the fellow-members of our profession. The performance of such a duty unfortunately but inevitably invites bitter resentments, unwarranted attacks and unfounded challenges of motives, and it creates deep and lasting enmities. Constant resoluteness of purpose is called for in order to resist appeals of friendship and disregard the probability or the menace of attempted reprisals. The duty, however, must be performed and by the Bar, and it must not be shirked. There is no substitute. No other body of citizens is equally qualified. The sole consideration must be the best and permanent interest of the public, and the standard of performance must be a courageous, unshakable and uncompromising determination to seek the truth and to be just, fair and impartial.

It is urged that every Bar Association should have its Committee on the Judiciary; it should charge that committee with the

constant duty of investigating the practical administration of justice and the qualifications and services of the judges, and it should publish reports as to the qualification of candidates for judicial office, so that the public may be informed of their fitness or unfitness. No higher or more essential service can be rendered to any community. The vigilant activity of a united Bar will be practically controlling in most instances, and the profession can never exercise a greater influence for the public good than when thus placing its organized strength, its collective action, its vivifying *esprit de corps*, at the service of the State. Let the Bar do its full duty and inculcate an appreciation of the practical value and moral grandeur of the public service rendered by our judges, and the people will respond to its efforts and leadership if satisfied that its members are striving unselfishly and consistently for a competent, independent and incorruptible judiciary.

Whether we have the appointive or the elective system, the paramount duty and responsibility of the profession is clearly to co-operate in securing the appointment or nomination of properly qualified lawyers to judicial office and in unitedly and steadfastly opposing the appointment or nomination of those who have not the necessary fitness. Seldom will it be that an executive officer will appoint or that political parties will nominate for judicial office an unfit candidate in defiance of the objections and protests of a united Bar. Either system will work satisfactorily if the profession will do its duty in this matter, and, exerting its influence constantly and unitedly to the utmost, uncompromisingly insist that competency, experience and character shall at all times be the controlling factors in the selection of our judges.

WILLIAM D. GUTHRIE.

New York City, N. Y.

HIGHWAYS—STATUTORY REGULATION OF MOTORIST.

SCOTT v. STATE.

233 S.W. 1097.

(Court of Criminal Appeals of Texas.
Oct. 5, 1921.)

Vernon's Ann. Pen. Code Supp. 1918, art. 820M, compelling the driver of an automobile striking a person to stop and render assistance, must be construed to mean that the party shall render all the aid which would reasonably appear to him as an ordinary person at the time to be necessary, and when so construed is valid.

HAWKINS, J. Appellant was convicted under a prosecution based on article 820M, Vernon's P. C., and his punishment assessed at a fine of \$100 and 90 days' confinement in the county jail.

No statement of facts accompanies the record, and the case is presented here on the sole question as to whether said article is sufficiently specific in defining the offense sought to be denounced. In 1917 the Legislature passed an act which has sometimes been called the "Highway Law," but more properly speaking one "Regulating Operation of Motor Vehicles." This law was amended at the same session, and again in 1919, and with these amendments is brought forward in Vernon's P. C. as articles 820A to 820Z. We have already had occasion to review this law, upholding some of the provisions, and holding article 820D, relating to glaring headlights, void for indefiniteness (*Griffin v. State*, 86 Tex. Cr. R. 498, 218 S.W. 494), and also that a portion of subdivision (a), article 820K, is likewise inoperative and unenforceable in a criminal proceeding for the same reason (*Russell v. State*, 228 S. W. 566).

We quote so much of article 820M as may be necessary, deleting for convenience the portions not here required:

"Whenever an automobile strikes any person, the driver of, and all persons in control of such automobile, shall stop, and render to the person struck all necessary assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment, if such treatment be required, or if such carrying is requested by the person struck."

Appellant was charged under this law. If the law can be held good, the indictment is sufficient.

Counsel for appellant, in his brief, admits the article is commendable in purpose. This

is true with reference to the whole of the act in question. Not until 1917 did our Legislature undertake general legislation on the subject, but in many states the necessity for statutory enactments to supplement the common-law rules was recognized many years before. With the constantly increasing use of motor vehicles both for business and pleasure purposes, the demand for road regulations in their use has become imperative. The driver who may strike a person or vehicle today may tomorrow himself be the victim.

The general rule for the construction of statutes, of course, applies, and has been recognized not only by the courts of our own but of other states, as well as by the textwriters on motor vehicles.

The following quotation is from Black's Interpretation of the Law, § 115, and is copied as section 130, p. 93, in "The Law Applied to Motor Vehicles," by Blakemore:

"Statutes enacted by the Legislature in the exercise of police power, for the promotion of preservation of the public safety, health, or morals, may sometimes impinge upon the liberty of individuals, by restricting the use of their property, or abridging their freedom in the conduct of their business. When this is the case, such statutes ought always to receive such a construction as will carry out the purpose and intention of the Legislature with the least possible interference with the rights and liberties of private persons;" such enactments having "designed to further the general welfare by derogating from the liberty of a few."

Since motor vehicles have become a common means of travel upon the public highways, many statutes have been enacted in an effort to protect the public health and safety from the consequences of the use of automobiles upon the roads and streets. Some of these statutes have been assailed upon the ground that they manifested an exercise of power not inherent in the legislative department of the government, and others have been attacked upon the ground that in them are found unreasonable requirements. *Ruling Case Law*, vol. 6, p. 397; *Berry on Automobiles*, § 1601; *Ex parte Parr*, 82 Tex. Cr. R. 528, 200 S. W. 404; *State v. Mayo*, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512; *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977, Ann. Cas. 1915A, 161; *State v. Sterrin*, 78 N. H. 220, 98 Atl. 482.

In some of these decisions, statutes requiring that one causing an injury by collision with an automobile shall do some affirmative act,

act, such as furnishing information showing his name and address, have been upheld.

We have just recently received a supplemental brief from appellant, citing the Russell Case, supra, and urging that it and the Griffin Case, supra, and other authorities cited by him, are decisive of this case. In the subsequent discussion we are not unmindful of the principles upon which these cases were disposed of, but have reached the conclusion that the law in question can be upheld without doing violence thereto.

A party operating an automobile which may injure another in collision ought to be impelled by humanitarian motives, in the absence of any law, to tender aid in an effort to minimize the result of the injury. In doing this he would naturally and instinctively do the thing which to him under the circumstances, appeared to be proper and necessary to alleviate suffering. If his own car was uninjured so that it might still be operated, perhaps the most natural thing for him to do would be to try and get the injured persons to a physician or surgeon as quickly as possible.

The statute ought not be given such a construction as would or might result in manifest harm to a person accused of violating it. It would be impracticable for the Legislature to undertake to say that in a certain kind of accident this particular kind of aid should be extended, and in another accident aid of some other character would be proper. Every case must be governed by the circumstances attendant upon it. What would appear to be "all necessary aid" in one case might not so appear in the next one, likewise it might reasonably appear to be necessary to get the injured person to a physician or surgeon for treatment in one instance and not in another; hence the fact that it would be futile for the lawmakers to undertake to be specific in particularizing what aid should be rendered becomes apparent. That the statute contains a humane provision cannot be gainsaid. If it can be construed to require that to be done which ought to be done even in the absence of the law, and without hurt to the individual, it ought, as so construed, to be upheld.

It would be manifestly unfair in measuring the extent of the aid rendered to have the court or jury pass upon that issue in the light of developments subsequent to the time of the accident. An injury might appear slight at the time, suggesting little necessity for aid of any

kind, but internal injuries of serious nature might develop later. An accused could not be held criminally liable for a failure to do what was not reasonably apparent to him as necessary at the time. One acting in apparent necessary self-defense does so from what appears to him, viewed from his standpoint at the time, with all the facts and circumstances within his knowledge, and not from the viewpoint of somebody else, or the jury, in the light of subsequent events.

We have reached the conclusion that a fair and reasonable construction of the statute in question is that the party should render all the aid which would reasonably appear to him as an ordinary person at the time to be necessary, including taking the injured persons to a physician or surgeon, if so requested by them or if it reasonably appears to accused that medical treatment be necessary. We think the word "required" in the connection used means only "necessary." The jury ought to be so instructed (if it be an issue) that, if accused gave all the aid which under the circumstances reasonably appeared to him to be necessary, he should be acquitted, and that, if under all the circumstances it did not reasonably appear to him to be necessary to carry the injured parties to a physician or surgeon for treatment, he could not be convicted for a failure to do so, unless he was requested by them to be so taken, and declined.

We can perceive no violence to the general rule of construction in reaching this conclusion. No new provision has been read into the law. We only construe what "all necessary aid" means in the statute, and say it must be determined from an accused's standpoint as to how much and what character of aid appeared to be necessary under any given state of facts. Surely the driver of an automobile should have no trouble in understanding in advance that in case of an accident he was expected and required to do what appeared to him to be necessary to alleviate suffering.

We think no error was committed by the trial judge in overruling the motion to quash the indictment and in arrest of judgment, because of the matters urged against the sufficiency of the statute in question.

Appellant complains that the indictment is defective in not alleging that accused "knowingly" struck the party injured, or that, "knowing" he had struck him, he failed to stop and render aid. We cannot agree to this contention. The word "knowingly" or "knowing"

does not appear in the description of the act denounced as an offense, and it is not necessary for the state to so allege. If it becomes an issue on the trial, lack of knowledge on the part of a defendant that he had injured someone would excuse him and be a defense to a prosecution under the article in question. The trial judge recognized this as the law, and submitted that issue to the jury.

Believing the article of the statute should be upheld as construed in this opinion, the judgment of the trial court is affirmed.

NOTE—Validity and Construction of Statute Requiring Motorist Striking a Person to Render Assistance.—Statutes have been held valid which require the driver or owner of an automobile, in case its operation causes injury to person or property, to stop and give his name and address and other information, to the person injured if person or property, or to some other suitable person, and to render assistance to the injured. *Woods v. State*, 15 Ala. App. 251, 73 So. 129; *People v. Fodera*, 33 Cal. App. 8, 164 Pac. 22, rehearing denied by Supreme Court; *People v. Finley*, 27 Cal. App. 291, 149 Pac. 779; *State v. Sterrin*, 78 N. H. 220, 98 Atl. 482.

A statute which makes it a crime for the driver of a motor vehicle, or of any other vehicle, and the person, if any, therein having control over the driver, in case of a collision with any person or vehicle, to refuse to stop and render to the person struck, or to the occupants of the vehicle collided with, all necessary assistance, and to give such injured person or persons the number of his vehicle, his name and address, and the name of the owner of such vehicle, is not violative of the constitutional provision that "no person shall be compelled, in any criminal case, to be a witness against himself." *Woods v. State*, 15 Ala. App. 251, 73 So. 129; *People v. Diller*, 24 Cal. App. 799, 142 Pac. 797; *Ex parte Kneidler*, 243 Mo. 632, 147 S. W. 983, Ann. Cas. 1913C 923.

"In each of these cases it is pointed out that the operation of an automobile upon the public highways is not a right, but only a privilege which the state may grant or withhold at pleasure, and that what the state may withhold it may grant upon condition. One condition imposed is that the operator must, in case of accident, furnish the demanded information. This condition is binding upon all who accept the privilege. The defendant also claims that the statute is unconstitutional, in that it requires him to furnish evidence which might be used against him in a criminal proceeding. Bill of Rights, art. 15. The same question has been raised in other states, and in each the conclusion has been reached that the statute is valid." *State v. Sterrin*, 78 N. H. 220, 98 Atl. 482 (1916).

Further, see *Berry, Automobiles* (3d ed.), secs. 57, 1601.

ITEMS OF PROFESSIONAL INTEREST.

THE PROPER PROCEDURE UNDER EQUITY RULE 29 TO TEST AUTHORITY OF ATTORNEY TO REPRESENT PLAINTIFF.

Rule 29 of the new Federal Equity Rules, promulgated by the United States Supreme Court at the October term, 1912, reads as follows:

"Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered."

This rule is almost identical with Equity Rule 32 of the Supreme Court of the District of Columbia adopted in 1909. The question which this paper will discuss is whether under the above rules the motion to dismiss is a proper proceeding to test the authority of an attorney representing the plaintiff. A brief analysis of Rule 29 will enable us to settle the question more readily. By the effect of this rule:

(1) Demurrers are abolished. Pleas are abolished.

(2) Defense in point of law arising upon the face of the bill heretofore made by demurrer or plea shall be made by (a) Motion to dismiss, or (b) In the answer.

(3) Defenses heretofore presentable by (a) Plea in bar, (b) Plea in abatement, shall be made in the answer. (Discretion of court to hear separately.)

(4) Motions to dismiss may be set down for hearing.

From the above analysis it is clear that if it were possible before the rule was adopted, either by a plea in bar or by a plea in abatement, to raise the question of the authority of the attorney to represent his client in a suit, then that question should be raised by the

defendant in his answer. If, on the other hand, before the adoption of the rule, the question could not have been raised in a demurrer, then it now may be taken advantage of either in a motion to dismiss or in the answer. It becomes necessary, therefore, to ascertain by what method, previous to the adoption of Equity Rule 29, the authority of counsel to institute a suit might be questioned.

Since attorneys are officers of the court, there is a firmly established presumption in favor of an attorney's authority to act for any client he professes to represent, and, therefore, ordinarily it is unnecessary for an attorney to show his authority.¹ But, on account of the relation of the court to its attorneys, who are its officers, and the power which it has over them, it can, if the facts submitted warrant it, call upon a plaintiff's attorney in any suit to show his authority.² And so it has been held that either party to a suit may question an attorney's right to appear.³

However, as the objection to an attorney's authority to appear is of a dilatory character, such objection must be made at the first opportunity.⁴ It has been held that after answer had been filed and the case called for trial, it was too late for defendant to demand that the plaintiff's counsel produce his authority for appearing.⁵ *Sed quaere*.

When we come to ascertain the methods employed in raising the question of an attorney's authority to represent his alleged client, it has been held that such a question cannot be raised by demurrer to the complaint.⁶ Nor can it be presented in a plea,⁷ or raised collaterally or in the answer.⁸ The proper method is set out by Delaney, District Judge, de-

livering the opinion of the court in *Bonnifield v. Thorp*:⁹

"The practice is also well settled that the authority for an attorney to appear cannot be called into question except by a motion directly for that purpose, based upon affidavits, showing in the first instance *prima facie* a want of authority; and, upon the hearing, such want must be established by clear and positive proofs. The proceeding may be by motion to vacate the appearance, to dismiss the action, or for an order requiring authority to be shown; and in cases where the validity of an order, judgment or decree depends upon the jurisdiction of a court over the person of a party, acquired solely by an appearance of attorneys, the authority of such attorneys may be attacked upon a motion to vacate the order, judgment or decree. In the absence of some such proceeding, directly challenging the authority, the court will not hear or inquire into the question of the authority of the attorney for his appearance."¹⁰

The rule is thus stated in *Cyc*:¹¹

"The question of an attorney's authority to represent an alleged client cannot, it has been held, be raised collaterally, or on a demurrer, nor should it be set up in a pleading, but must be raised on motion directly for that purpose, and supported by affidavits."

And in *Story's Equity Pleading* it is stated as follows:¹²

"When the plaintiff in a suit at law is a fictitious person, the defendant may plead it in abatement. In equity a different and more summary course is adopted, and upon motion the court will direct a stay of the proceedings, or that the bill be taken off the files, and will order the solicitor to pay the costs for his contempt in instituting the suit. If the name of a complainant should be used without his authority, a similar course would be pursued."

Thus it will appear that, independently of the above rules, it is improper to raise the question of an attorney's authority to represent his client by demurrer, plea or answer. The reason for this seems clear, especially in the case of an attorney representing the plaintiff. It is in the nature of a dilatory question which, under the civil law, would be raised

(1) 6 C. J. 635, 4 Cyc. 928, and cases cited.

(2) *New York City and County Com'rs v. Purdy*, 36 Bard. 266; *Hollins v. St. Louis & C. R. Co.*, 57 Hun 139, 11 N. Y. Supp. 27, 25 Abb. N. C. 93; *Vincent v. Vanderbilt*, 10 How. Prac. 324, 1 Abb. Prac. 193; *Ninety-Nine Plaintiffs v. Same*, 11 N. Y. Super Ct. (4 Duer) 632.

(3) *People v. Mariposa Co.*, 39 Cal. 683; *In re Gillespie*, 11 Tenn. (3 Yerg.) 825.

(4) *Miss v. People*, 116 Ill. 265, 4 N. W. 783; *Rogers v. Commelin*, Fed. Cas. No. 12,003.

(5) *Roland v. Gardner*, 69 N. C. 57.

(6) *State v. Baxter*, 38 Ark. 462; *Gibson v. State*, 59 Miss. 341. *Mix v. People*, supra.

(7) *North Brunswick v. Booream*, 10 N. J. L. (5 Halst.) 257.

(8) *Bonnifield v. Thorp*, 71 Fed. 924; *Indianapolis, B. & W. R. Co. v. Maddy*, 103 Ind. 200, 2 N. E. 574; *Louisville, St. L. & T. R. Co. v. Newsome*, 13 Ky. Law Rep. 174; *People v. Lamb*, 85 Hun 171, 32 N. Y. Supp. 584.

(9) 71 Fed. 824 (appeal dismissed, 83 Fed. 1022).

(10) Citing *Hollins v. St. Louis & C. R. Co.*, supra; *Insurance Co. v. Pinner*, 43 N. J. Eq. 52, 10 Atl. 184; *Hill v. Mendenhall*, 21 Wall. 453; *McKiernon v. Patrick*, 4 How. (Miss.) 336; *Howe v. Anderson* (Ky.), 14 S. W. 216; *Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61; *Williams v. Canal Co.*, 13 Colo. 469, 22 Pac. 806; affirmed in *Dillon v. Rand*, 15 Colo. 372, 25 Pac. 185; *Winters v. Means*, 25 Neb. 241, 41 N. W. 157; *Turner v. Caruthers*, 17 Cal. 432; *People v. Mariposa Co.*, supra. See also 6 C. J. 635, and cases cited.

(11) 4 Cyc. 930.

(12) § 498.

before the praetor in order that he might decide whether the case should go before the judge, like a question which must be raised *ante litem contestam*. In other words, it is not a question of pleading, but a question that goes to the good faith of a sworn officer of the law in his relations to the court, and on this account, the courts have uniformly held that it is such a question as must be taken up independently of the pleadings and by a motion directly for the purpose.

The point which we are called upon, therefore, to determine is whether the above rules reverse this well established doctrine. As their titles show, they are directed to the subject of *defenses* and the methods of presenting them. Prior to their adoption, defenses might be presented by demurrers, pleas and answers. Demurrers and pleas are abolished by the rule, and, as a substitute for the demurrer, the motion to dismiss is adopted.

The question of the authority of an attorney to represent a plaintiff, therefore, does not present a defense to a suit. Since, before these rules were adopted, it was not proper to raise the question either by demurrer, plea or answer, it seems clear that the rules were not intended to contract the sphere of the motion to dismiss, but rather to enlarge it and to require that such motions should be used in the future where formerly it was not customary to do so. And since, before the adoption of the rules, it was proper to raise the question of an attorney's authority to represent his alleged client by a motion to dismiss and improper to do so by the pleadings, it would seem that it is still proper to raise this question by a motion to dismiss, and not by the answer. CHRISTOPHER B. GARNETT, in the *Virginia Law Review*.

HUMOR OF THE LAW.

She. You ought to be ashamed of stealing a kiss.

He. You are equally guilty. You received the stolen goods.—*Edinburg Scotsman*.

Patsy Doolan was taken up on the charge of stealing a watch. His employer was called as a witness to character, and said that he had always found the accused honest and upright. Unfortunately there was evidence to the contrary with regard to the case at issue, and Patsy was convicted and sent to prison, to the great distress of his wife, who left the court weeping bitterly. A neighbor, seeking to comfort her, said: "Och now, Mary, don't take

on so. Just think what a good character Mr. Byrne gave your man. Sure we'd never have known what a fine fellow Patsy was if he hadn't stolen that watch."—*Pittsburg Sun*.

An indictment had been found against a colored man, relates the Jacksonville Observer, for (as the indictment read, following the words of the statute) "breaking and entering into a dwelling house in the nighttime, with intent to commit a felony."

The case coming on for trial, the defendant pleaded "not guilty." The testimony showed, without any doubt, that the prisoner, on the night in question, climbed up the piazza to the second floor, and then broke in through a window upstairs, into an upper room. Just then a man rushed into the room and grabbed him before he had a chance to get anything. No evidence was introduced to the contrary. After the arguments of the counsel pro and con, and the charge of the court to the jury, the jury retired to consider their verdict. In a very few minutes the jury had all agreed except one, on a verdict of guilty. This one, however, was a colored preacher, who said he could not agree to such a verdict because, he said, the indictment read that the "breaking and entering was to be with intent to commit a felony." "Now," said he, very emphatically, "whar was de evidence of de intent?" Then a long argument ensued over the question of "intent" between the white jurors and the colored preacher, who repeatedly and emphatically inquired, "Whar was de evidence of de intent?" The white jurors hated to come into court and say that they could not agree upon a verdict of guilty in such a plain case as that, but they could not see any other way to do.

But just then a colored juror, who had been sitting quietly all through the discussion, saying nothing, turned to the preacher, looking him straight in the face, and said: "See heah, youse a preacher isn't you?"

"Yes, I is. I is a minister ob de Gospel," straightening up proudly.

"Well, den, I specks you believes de Bible?"

"Yes, sah I believes ebery word in de Bible."

"Well, den, don' the Bible somewhar say dis: 'Verily, verily, I say unto you, he that entereth not by the door, but climeth up some other way, the same is a thief and a robber?'" (St. John chap. 10, 1st verse.)

The preacher gasped and came immediately down. "Dat so, dat so," he said. "I guess he guilty. Yes, he guilty."

And so the verdict was brought right in.—*Case and Comment*.

WEEKLY DIGEST.

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1. **Attachment—Amendment of Complaint.**—A surety company, executing a bond to release an attachment, such bond undertaking to pay any judgment obtained in the action, is not discharged, under Civ. Code, § 2819, by an amendment of the complaint, not setting up a new cause of action, but merely increasing the amounts demanded for breach of contract.—*Turner v. Fidelity & Deposit Co. of Maryland*, Cal., 200 Pac. 959.

2. **Attorney and Client—Attorney's Lien.**—An attorney by whom a judgment or decree was obtained for his client has a lien upon a fund arising from enforcement of such judgment or decree against the land of the debtor, by another attorney employed by his client, prior and superior to the lien thereon of such subsequently employed attorney, unless he has expressly or impliedly assented to such subsequent employment or, in some way, relinquished his right further to represent his client in the matter, or, by negligence or other misconduct warranting his discharge, has lost it.—*Brown v. Erwin*, W. Va., 108 S. E. 605.

3. **Authority of Attorney.**—In a summary proceeding in ejectment, where the jury gave possession of the property to the owner and fixed the rental at \$111.66, contrary to the testimony of what a fair rental should be, and an intimation by the court that the verdict would be set aside as against the weight of evidence, unless plaintiff consented to a reduction in the rental to \$60, held, where it is established that attorney's consent to such reduction and compromise is without express authority from the client and contrary to his instruction, such judgment will be set aside.—*Bizzell v. Auto Tire & Equipment Co.*, N. C., 108 S. E. 439.

4. **Value of Services.**—An attorney employed to perfect title to certain land under a contract entitling him to certain interest in the land for such services could not, on client's termination of contract before he had fully performed services, recover as reasonable value of the services, upon quantum meruit, more than the value of the land which would have been his compensation for his services had the title been perfected.—*Smith v. Thompson*, Tex., 233 S. W. 876.

5. **Bankruptcy—Motion to Intervene.**—Motion to intervene in bankruptcy proceedings by applicants who allowed a default of nearly two months to run against them without any excuse whatever may be denied, in the discretion of the court.—*In re Tidewater Coal Exchange*, U. S. D. C., 274 Fed. 1011.

6. **Partnership.**—Bankr. Act, § 5a, providing that a partnership may be adjudged a bankrupt, treats a partnership as an entity, and in view of General Order in Bankruptcy No. 8, providing that a member of a partnership who refuses to join in a petition to have the partnership declared bankrupt "shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership," that he shall be served with notice, and "shall have the right to appear . . . and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act," a petition filed against a partnership by one partner alone must conform to the requirements of an involuntary petition and must allege insolvency and an act of bankruptcy by the partnership.—*In re Ollinger & Perry*, U. S. D. C., 274 Fed. 970.

7. **Priority of Payment.**—The United States Shipping Board Emergency Fleet Corporation, incorporated under the general corporation law of the District of Columbia pursuant to Act, Sept. 7, 1916, §§ 11, 13, given the President's authority to construct, purchase, and requisition vessels under Act June 15, 1917, by the President's executive order of July 11, 1917, was not entitled to priority of payment under Bankruptcy Act, § 64, and Rev. St. § 3466, of a debt due it from a bankrupt with whom the corporation made a contract as a principal, and not as the agent of the United States government, on the theory that the debt was one due to the United States, since, the corporation having been organized as a private corporation under the District of Columbia's general incorporation law, the government's ownership of the stock did not divest it of its character as a private corporation, in view of §§ 607, 608.—*In re Eastern Shore Shipbuilding Corporation*, U. S. C. C. A., 274 Fed. 893.

8. **Taxes.**—Under Bankruptcy Act, § 64a, claim of the government for taxes is not ordered paid in its entirety as matter of course and the trustee remitted to proceedings under Rev. St. § 3226 to have the money returned, but the bankruptcy court passes on and determines validity of the tax in the first instance; it not being a case where the trustee is seeking to maintain a suit for recovery of internal revenue taxes illegally assessed, the government and not the trustee being the moving party, and this notwithstanding the trustee moves that the government's proof of debt be reconsidered and rejected, a verified proof of debt in bankruptcy having probative force and making out a prima facie case requiring the objector to go forward.—*In re General Film Corporation*, U. S. C. C. A., 274 Fed. 903.

9. **"Unincorporated Association."**—The Tidewater Coal Exchange, an association organized by shippers of bituminous coal during the war with Germany, at the instance of the Council of National Defense, for the purpose of speeding the transshipment of coal from cars to ships at tidewater, etc., involving a general pooling arrangement for coal, with debit and credit charges against and for each member, held an "unincorporated company" within Bankruptcy Act, § 4B, so as to give the District Court jurisdiction of an involuntary petition against it.—*In re Tidewater Coal Exchange*, U. S. D. C., 274 Fed. 1008.

10. **Voluntary Petition.**—There is no presumption of authority in an officer of a corporation to make and file a voluntary petition in bankruptcy, and he may not do so without the consent of the directors.—*Regal Cleaners & Dyers v. Merlis*, U. S. C. C. A., 274 Fed. 915.

11. **Bills and Notes—Liability of Endorser.**—To render an endorser liable on a negotiable note, it must be presented at the particular time and place specified therein and timely notice of its dishonor given the endorser, unless it is alleged and proven that he in some way waived such notice.—*Hastings v. Gump*, W. Va., 108 S. E. 600.

12. **Brokers—Commission.**—A commission is earned when the broker produces a purchaser accepted by the principal, and the subsequent

agreement of the principal and the buyer to abandon the contract will not defeat the broker's claim for commission, nor place on the broker the burden of restoring to the purchaser a deposit on the price not in excess of the agreed commissions.—*Smith v. Eells*, Iowa, 184 N. W. 385.

13.—**Commission.**—A broker who undertakes to find a purchaser for land at a stipulated price earns his commission when he procures and produces to his principal a person who is able, ready, and willing to buy at that price, and he does not earn his commission if he fails to produce such a purchaser; but, if a broker has brought the parties together and they conclude a contract, he is not deprived of his right to a commission by the fact that the contract differs in terms from the one which he was authorized to negotiate, provided the negotiations commenced by the broker continued uninterruptedly.—*Dancy v. Baker*, Ala., 89 So. 590.

14. **Constitutional Law—Due Process.**—It is a violation of the Fourteenth Amendment of the federal Constitution, if a judgment in a personal action is enforced, which has been entered by default on the service of the summons by publication; but, unless process is issued on the judgment in an effort to enforce it defendant cannot claim his rights are violated.—*Cahill v. Broadwell Productions*, N. Y., 190 N. Y. S. 225.

15. **Contracts—Mutual Agreement.**—A contract, "We, the undersigned, children of R., and the only beneficiaries under her will," agree to turn over to the executor an eighth part of the property of the testatrix from our distributive share, with the understanding that the same shall be paid to disinherited grandchildren, who did not sign held obviously drawn as a mutual agreement between the several parties, to be signed by all of them, which was not binding on any of them, where all did not sign.—*Hess v. Lackey*, Ind., 132 N. E. 257.

16.—**Public Policy.**—In contracting with a lumber company that the latter assume liability for the loss of lumber deposited on a wharf during a strike of longshoremen, the wharfinger violated no law against public policy.—*Northwestern Mut. Fire Ass'n v. Pacific Wharf & S. Co.*, Cal., 200 Pac. 935.

17. **Corporations—Purchase of Stock.**—An agreement of a corporation with an intending purchaser of stock to take back the stock on demand is enforceable by such purchaser.—*Williamson v. Marshall*, Cal., 200 Pac. 1058.

18. **Criminal Law—Sufficiency of Indictment.**—Burglary indictment, charging that defendant broke into named person's private garage, held to charge crime with sufficient certainty, notwithstanding failure to define the word "garage," or to state that the private garage was a building; the word "garage" being well understood to mean a building for the storage of automobile vehicles.—*Taylor v. State*, Ind., 132 N. E. 294.

19. **Eminent Domain—Railroad Property.**—Railroad property is not to be condemned for a street, though it be not actually in use, if it will be needed for the company's use in the future; and this, though the railroad's franchise from the city to operate on certain streets has been forfeited by the city.—*In re 221st Street*, N. Y., 190 N. Y. S. 235.

20. **Fish—Police Power.**—The state may, under its police power, for the protection in the streams, lakes, and ponds of this state, and for the purpose of encouraging the breeding of fur-bearing animals and other game which have access to the public waters of the state prohibit the depositing of crude oil and other deleterious substances therein.—*State v. Wheatley*, Okla., 200 Pac. 1004.

21. **Gifts—Joint Bank Deposit.**—A bank's transfer of a savings account, if made in conformity with an order of the depositor authorizing its change to a joint account between himself and wife, subject to withdrawal by check of either, the balance on the death of either to belong to the survivor would not be

a valid gift, where it was not shown that such depositor, in his lifetime, released control and dominion over it.—*Pearre v. Grossnickle*, Md., 115 Atl. 49.

22. **Guardian and Ward—Illegal Agreement.**—Although the guardian, mother of the ward, had a right to use and enjoy his property as her residence during her life, her contract as guardian, with a purchaser made privately, to let him have all the property would bring on sale by court order above a certain amount, was known to the purchaser to be illegal and void, and he cannot maintain an action against her personally thereon.—*Wilson v. McKleroy*, Ala., 89 So. 584.

23. **Highways—Negligence.**—Where the traveled track of a public road is to one side of the center thereof, it is not negligence as a matter of law to drive in such track, though it be upon the left side of the road to the particular driver.—*Keane v. Butner*, Minn., 184 N. W. 571.

24. **Homicide—Trespasser.**—Officers who went on the porch of accused's house in a peaceable manner and with lawful purpose, and without intent to search his barn for intoxicating liquors without a warrant, if he objected were not trespassers, and court properly refused to so charge in a homicide case.—*Lakey v. State*, Ala., 89 So. 605.

25. **Insurance—Crops.**—Although under C. S. § 2355, the possession and title to all crops raised by tenant or cropper in the absence of a contrary agreement are deemed to be vested in the landlord until the rent and advancements have been paid, this does not divest the tenant of an insurable interest in the crops before division.—*Batts v. Sullivan*, N. C., 108 S. E. 511.

26.—**"Immediate Notice."**—The policy covering the case required that, in event of accidental death, immediate notice must be given to the company. This means within a reasonable time. Almost immediately after death the soliciting agent who negotiated the policy procured it and surrendered it to the company as plaintiff claims without her authority. It was never returned to her though later demanded. Held, this and other circumstances in the case excused plaintiff from giving notice of death.—*Frommelt v. Travelers' Ins. Co.*, Minn., 184 N. W. 565.

27.—**Proof of Loss.**—Where insurer's adjuster, on being notified by insured that his automobile had been stolen, promised to take care of him, took charge of the matter, examined the policy and other papers, made a record of the case from answers to questions asked of insured, and promised they would return the car or pay for it within 60 days, it waived subsequent tender of proof of loss.—*Douglas v. Insurance Co. of North America*, Mich., 184 N. W. 539.

28.—**Repairs.**—A marine policy provision that no claim of loss shall go beyond the cost of actual repairs, considered with provision for estimating loss, held merely a limitation of claim for loss to the cost of repairs, if made, and if no repairs are made, insured may recover damages found on survey.—*Walker v. Liverpool & London & Globe Ins. Co.*, N. Y., 190 N. Y. S. 255.

29. **Insurrection and Sedition—Martial Law.**—Martial law operating, in the government of territory, as a substitute for the civil law, or as an addition thereto, so as to restrict the liberties of citizens and augment the powers of officers, is an incident of military operations and of actual military occupation of the territory so governed; wherefore it cannot obtain in the absence of such operations and occupation.—*Ex parte Lavinder*, W. Va., 108 S. E. 428.

30. **Intoxicating Liquors—Liability for Wife's Acts.**—In a prosecution of a husband, his wife already having pleaded guilty to violation of liquor law in their home, the act being *malum prohibitum* and not *malum in se*, it is not necessary to prove his criminal intent, his liability, if not doing what he could to prevent her violating the law, resting, not on the presumption of his coercion of his wife, but on his authority to control the household

affairs and use reasonable means to prevent violation of law.—*People v. Sybisloo*, Mich., 184 N. W. 410.

31.—**Sufficiency of Proof.**—In a proceeding to condemn an automobile used in transporting prohibited liquors, where the user's wife claimed the car, evidence that the husband contributed part of the cash payment, paid for all repairs, generally used the car as his own, claimed it as his at the time of the seizure, and, when the seller refused to sell to claimant, executed the purchase-money note, held sufficient to show that the car was his, though claimant furnished the remainder of the purchase price from money earned from boarders and money borrowed by her.—*Stutts v. State*, Ala., 89 So. 603.

32.—**Validity of Ordinance.**—A liquor ordinance is not invalid merely because it prescribes a less severe penalty than is prescribed by the Volstead Act for similar offenses.—*Ex parte Kinney*, Cal., 200 Pac. 966.

33.—**Landlord and Tenant—Liability for Rent.**—Where one is in the possession of real estate without special contract, he is liable for rent to the owner or person entitled to possession, and such owner or person entitled to possession may enforce his claim for rent by attachment as provided for by § 3809, Rev. Laws 1910.—*McBrayer v. Miller*, Okla., 200 Pac. 988.

34.—**Tenancy at Will.**—If a lease for "about a month" be treated as for an indefinite period creating a tenancy at will, it was such by implication, subject to the common-law rule requiring reasonable notice to terminate, and not within Code 1907, § 4732 requiring 10 days' notice to terminate an express tenancy at will; but, being in fact definite, meaning approximately a calendar month, a holding over created tenancy at sufferance requiring no notice for termination, so that in either event it was error to exclude lessor's demand for possession preliminary to suit for detainer.—*Rutledge v. White*, Ala., 89 So. 599.

35.—**Licenses—Presumed Reasonable.**—A license ordinance, enacted within the police power of a city, is not invalid though a slight mistake is made in calculating the cost of administration, and the fee is fixed too high if the surplus fund after the payment of all reasonable charges, is not so great as to manifest a purpose on the part of the legislative body to make the ordinance a revenue-producing measure.—*City of Mayfield v. Carter Hardware Co.*, Ky., 233 S. W. 789.

36.—**Master and Servant—Compensation Act.**—Under Workmen's Compensation Act, authorizing the employer to enforce the liability of a third person causing injury to an employee, and providing that, if the damages recovered exceed compensation paid, such excess must be paid to the employee, the employer's recovery against the wrongdoer is not limited to the amount of compensation paid.—*Bethlehem Steel Co. v. Variety Iron & Steel Co.*, Md., 115 Atl. 59.

37.—**Hours of Service.**—A railway telegraph operator, who was paid for about 12 hours' service out of 24-hour periods, but was in actual service only 5 or 6 hours, being released for periods of from 1 to 2 hours from time to time by the train dispatcher, held not "on duty" for a longer period than 9 hours, in violation of Hours of Service Act March 4, 1907, § 2.—*United States v. New York, N. H. & H. R. Co.*, U. S. C. C. A., 274 Fed. 321.

38.—**Malpractice of Physician.**—To render employer liable under Compensation Act for malpractice of physician, the injury must result from the necessary efforts to relieve from the consequences of the original injury received during employment.—*Wood v. Vroman*, Mich., 184 N. W. 520.

39.—**Subrogation.**—Injured employee, entitled to compensation under Workmen's Compensation Act for injuries by a third party, cannot by agreement not to sue third party deprive employer, or his insurer of the right of subrogation to employee's right to recover damages against third person under Code Senn. 1913, § 2477m6.—*Renner v. Model Laundry, Cleaning & Dyeing Co.*, Iowa, 184 N. W. 611.

40.—**Municipal Corporations—Defective Sidewalks.**—Where city constructed cement sidewalk with slippery surface, so that pedestrians exercising ordinary care slipped thereon, it was liable for the damages sustained; it being the city's duty in the construction of the sidewalks, to make them reasonably safe for the use of pedestrians.—*Schuler v. City of Moberg*, S. D., 184 N. W. 281.

41.—**"Motor Vehicle."**—A bicycle is not a "motor vehicle," within statutes regulating traffic.—*Niedzinski v. Coryell*, Mich., 184 N. W. 476.

42.—**Safety Zone.**—In action for injuries to prospective street car passenger struck by defendant's automobile truck passing within six feet from running board of street car in violation of city ordinance, the question whether the pedestrian, whose view of street was obstructed by automobile parked along curb where car stopped, was negligent held for the jury.—*Metcalf v. Peerless Laundry & Dye Co.*, Mich., 184 N. W. 482.

43.—**Unauthorized Contract.**—Not liable for electric current used under contract with corporation of which officials were stockholders.—*City of Hogansville v. Planters' Bank*, Ga., 108 S. E. 480.

44.—**Nuisance—Garage.**—The construction of a garage building and the operation of a garage business therein on street on which there was heavy traffic, such as street cars, freight cars, and trains with automobiles and trucks, with the noise and odors incident to such traffic and on which the property was more valuable for business than for residential purposes, will not be enjoined as a nuisance.—*Lansing v. Perry*, Mich., 184 N. W. 473.

45.—**Principal and Agent—General Agent.**—Where one executes a promissory note or a bill of exchange in his own name, with a descriptive suffix, such as "general agent," attached to his signature, and where it does not appear on the face of the instrument that he is acting for or in behalf of any one as principal, the instrument is presumably his individual obligation, and before any one can be held liable thereon as principal it must affirmatively appear that at the time of the execution of the instrument it was the intention of the parties to bind a particular person as principal, and that the maker, in executing the instrument, had authority to act as agent for, and to bind such person as, the principal.—*Atlas Assur. Co. Limited, of London England v. First Nat. Bank*, Ga., 108 S. E. 474.

46.—**Sales—Misrepresentation.**—A corporation, purchasing scrap iron in reliance on the seller's representation that it was cast iron, which, on discovering the iron delivered was chilled iron and unsuited for the purposes for which it was purchased, stored it where it would be protected and notified the seller it was subject to its order is not liable for the contract price.—*Cameron Compress Co. v. Texas Rag Corporation*, Tex., 233 S. W. 781.

47.—**Searches and Seizures—Owner's Consent.**—That search warrant was not properly issued is immaterial, if owner of searched house consented to the search.—*Bruner v. Commonwealth*, Ky., 233 S. W. 795.

48.—**States—Public Welfare.**—The object of Laws 1920, c. 872, § 5 providing for issuance of bonds by state for a bonus to persons who served in the military or naval service of the United States is public and for the public welfare, a bonus being an incitement to patriotism and an encouragement to defend the country in future conflicts.—*People v. Westchester County Nat. Bank*, N. Y., 132 N. E. 241.

49.—**Street—Railroads—Collision.**—Where a driver, whose wagon was struck when he attempted to cross ahead of a street car at a street intersection, saw the approach of the car when it was 80 feet away, the motorman was not required to give a signal of the approach of his car.—*Mayer v. Louisville Ry. Co.*, Ky., 233 S. W. 785.

50.—**Stipulations—Jurisdiction.**—Supreme Court had no jurisdiction to consider authority

and jurisdiction of Public Service Commission to make an order concerning rates of a gas and electric company, from which certiorari would lie, under Code Civ. Proc. § 1279, relating to submission of controversies, notwithstanding stipulations of the parties.—*City of Rochester v. Rochester Gas & E. Corp.*, N. Y., 190 N. Y. S. 229.

51. **Taxation—Alien Poll Tax Law.**—The Alien Poll Tax Law of 1921, imposing a poll tax on alien inhabitants without requiring such tax to be paid by similarly situated citizens of the United States, held violative of Const. U. S. Amend. 14, § 1.—*Ex Parte Kotta*, Cal., 200 Pac. 957.

52. **Foreign Corporation.**—New York Tax Law §§ 208 and 2191 providing that a foreign corporation for the privilege of doing business in the state shall pay a tax of 3 per cent on its local income, to be determined by a consideration of the relative value of its entire property and accounts receivable and of its property and accounts receivable in the state, but which authorizes the corporation to present, and the assessing commission to consider, other relevant facts, held to provide a rule of allocation *prima facie* valid, and not unconstitutional as taking property without due process.—*Gorham Mfg. Co. v. Travis*, U. S. D. C., 274 Fed. 975.

53. **Vendor and Purchaser—Vendor's Lien.**—Although defendant, purchasing at mortgage foreclosure sale, had notice of complainants' vendor's lien subordinate to the mortgage, there was no privity of contract between defendant and complainants, and defendant, occupying the status of prior mortgagee in possession after default with mortgagor's consent, was not accountable to complainants for rents and profits; the subject of the mortgage being the property of the mortgagee rather than of complainants.—*Sollie v. Outlaw*, Ala., 89 So. 561.

54. **War—Seditious Utterances.**—The indictment for aiding and abetting in an attempt to cause insubordination, disloyalty, and refusal of duty in the military forces of the nations when it was at war, the conduct of the principal being set out, need not allege the means employed by the abettor or the particulars of his incitement, aid, or assistance, but it is enough to charge, in general terms, that he knowingly aided and abetted the principal and induced and procured him to commit the principal offense.—*Matthey v. United States*, U. S. C. C. A., 274 Fed. 926.

55. **Waters and Water Courses—Boundary.**—Where the patent referred to the official survey which showed a meander line as the shore of the lake, but it appeared that the lake shore varied from the calls for the line so that the fractional subdivisions conveyed by the patent, if extended to the lake shore, exceeded by 50 per cent and 20 per cent respectively, the acreage stated, and the intervening land was intersected with ravines sometimes filled with water, and was of little value until oil was discovered thereon, the shore of the lake, and not the meander line, was the boundary of the tract conveyed by the patent. *Greene v. United States*, U. S. C. C. A., 274 Fed. 145.

56. **Rates.**—Despite the Home Rule Act, the city of New York has no right to bring action against a water supply company, whose water it does not use, to restrain it from putting into effect an increase of rates; the interest referred to in the Home Rule Act being no such interest as is contemplated by Code Civ. Proc. § 452. *City of New York v. Citizen's Water Supply Co.*, N. Y., 189 N. Y. S. 929.

57. **Wills—"Children."**—The word children in a will, does not include grandchildren, and the word "grandchildren" does not include great-grandchildren, unless the will discloses a contrary intention.—*Davidson v. Blackwell*, Ga., 108 S. E. 469.

58. **Intent.**—Where a will states testator's "desire" to leave all moneys and property to his wife, it is sufficient.—*In re Golicki's will*, N. Y., 190 N. N. S. 266.

59. **Joint Will.**—Survivor of joint testators by accepting benefits under the will was bound by its disposition of their community estate, and could not convey or otherwise dispose of any thereof contrary to provisions of the will.—*Heller v. Heller*, Tex., 233 S. W. 870.

60. **Remainder.**—Where testator gave his wife and surviving children equal shares of his estate in remaining after remarriage or death of the wife, with direction that daughters' shares be held in trust during their lives, and after their death paid over to their children, who are heirs at law, with no provision for the case of a daughter dying childless, where a daughter dies without children, the prior and absolute gift to such daughter in case she survives the remarriage or death of the wife will take effect, and the corpus of her share will pass to her heirs, executors, administrators, and assigns, and therefore she has the right to alien or assign such share.—*Perin v. Perin*, Md., 115 Atl. 51.

61. **Undue Influence.**—A will leaving only \$100 to wife was not of itself sufficient evidence of undue influence.—*In re Wall's Estate*, Cal., 200 Pac. 929.

62. **Witnesses—Reference to Books.**—In action for price of barrels, witness who had copied into a book the number of barrels delivered to customers, with names of customers to whom delivered, from entry of the number of barrels delivered and customer to whom delivered, made by an employe on a calendar sheet which had been lost at time of trial, was properly permitted to testify as to the entries she found on such calendar sheets after refreshing her memory by reference to the copy made.—*Corbin v. Staton*, Md., 115 Atl. 23.

63. **Work and Labor—Implied Contract.**—In an action on implied contract to recover from defendant for constructing curbing in front of her lots, as ordered by the village authorities, the fact that after the work was done, and while measurements and frontages were being taken by the village clerk, he requested defendant to exhibit her deed, which she did after stipulating it was without prejudice to herself, constituted no acquiescence on her part, and did not bind her.—*Peters v. Adams*, N. Y., 190 N. Y. S. 220.

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